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THE PROFESSIONAL AND PARLIAMENTARY LIFE OF LORD CAMPBELL.

JOHN CAMPBELL, the second son of the Rev. George Campbell, D.D., was born at Cupar, in the county of Fife, North Britain, September 15th, 1781. He was, according to the system pursued at the Scottish Universities, even in boyhood entered as a student in the United College of St. Andrew's, where he was a contemporary and companion of the distinguished divine, Dr. Thomas Chalmers. They were the youngest students in the University, and both of them were destined to hold the highest position in their respective professions.

Having resolved to devote himself to the study of the law of England, Mr. Campbell proceeded in due time to London, and in November, 1800, was entered as a student in Lincoln's Inn, and became a pupil of Mr. Warren, by whom he was, with others who subsequently attained distinction, as Lords Lyndhurst, Denman, and Cottenham, thoroughly initiated into the mysteries of special pleading. In the meantime, he was employed on the *Morning Chronicle* newspaper; a connection which he knew how to turn to good purpose, and which served at the time to replenish his coffers. When called to the bar in 1806, he undertook the duty of reporting the cases determined at *Nisi Prius* in the Courts of King's Bench and Common Pleas, and on the Home Circuit. The

skilful manner in which this work was executed added to the reputation which Mr. Campbell had already acquired for perseverance and industry. The succinctness and clearness of statement, the cautious exclusion of useless and irrelevant details, as well as the illustrations of points of law drawn from analogous cases and appended in the form of notes, impressed the members of the profession with the conviction that the reporter was in all respects qualified to take his part in the oral discussions at the bar of the courts of common law. Accordingly, general business began slowly and steadily to flow in upon him, until at last it had so much increased, that after the publication of four volumes of reports, embracing decisions from 1807 to 1816, he found it impossible, without doing injustice to his other professional engagements, to continue the series. In the early portion of his legal career, he bestowed considerable attention on the principles of criminal law and the forms of procedure in criminal prosecutions. His life, at this period, was a model of quiet, plodding, professional industry; and while marking the slow and sure steps by which he, unaided, advanced amidst the jostling of men of higher pretensions and more influential connections, the young lawyer may be taught a lesson of laborious diligence, of self-denial, and self-dependence, without which no manly or generous effort can be made, or lofty end obtained. It was not until 1827 that Mr. Campbell was invested with a silk gown; but his practice and his income had been at this time so materially improved, that he firmly maintained himself in the front rank of the bar, and was in such position that he could safely take advantage of any opportunity which should present itself for strengthening his political connections, and thereby planting his foot on the threshold of what in England is the only sure path to the highest professional honors.

Accordingly, in 1830, upon the dissolution of the parliament which expired with the reign of George IV., and the accession of Earl Grey to office, a path was open to the ambition of a young and pushing whig barrister, who had long been devoted to the party which had succeeded to power. Mr. Campbell attempted to secure a seat in the House of Commons, and presented himself as a candidate to the burgesses of Stafford. The canvass was contested, and he spared no personal exertions to justify the partiality of his friends. Amid the gleaming of torches and burning tar bar-

rels, he, at ten o'clock at night, addressed the assembled multitude from the window of his hotel, even after he had almost "lost his own voice in endeavoring to gain those of the burgesses of Stafford." He was elected, and sat as one of the members of Stafford in 1830 and 1831.

From the first hour of his entrance into the House of Commons, he was assiduous in the discharge of his parliamentary duties. Careful in the first instance not to intrude himself unnecessarily upon the attention of the house, he applied himself to watching its temper and becoming familiar with its forms; and, from time to time, he threw out such practical hints with reference to the business transacted, as gave assurance that he was a shrewd observer of the progress of each debate and that he could not fail ere long to prove a valuable acquisition to his party. No discussion was so minute in its details, or so partial in its operation, as to escape his notice; and, at times, his zeal outran his discretion. One of the objects which he had warmly at heart was the amendment of the law; and he devoted himself constantly to devise means to improve the state of the law of England, putting his own hands vigorously to the work, and encouraging his fellow-laborors. In an article like this it would not be practicable to give even the subjects of the enactments of the various law-amendment acts proposed and carried through by him. An outline of them may be seen in the volume of his printed speeches. On some matters of law reform, and especially in the matter of registration of deeds in England, which for many years he pressed upon the attention of the commons, with the greatest determination and energy, he was "fated to find an entire indifference on both sides of the house." The main object which he had in view by registration was merely to afford to all the means of ascertaining by search what deeds and instruments had been registered, and to provide a form, by observing which, a deed should be considered a registered deed. So simple a measure was deemed to be "fraught with the greatest mischief," and appeals were made to the prejudices of country members, who might prefer to have the title deeds to their estates in their own possession, rather than have them consigned to "the recondite mausoleum of parchments" which it was proposed to erect. He had the satisfaction afterwards, when a member of that body, to see his bill for the registration of assurances in England and Wales adopted by the House of Lords. In

the debates upon the Reform Bill, in consonance with the political opinions which he had cherished from early life, he supported that measure in all its integrity. In his speech on the second reading of the bill, while arguing in its favor, he asserted what to us appears a startling proposition: "That constitutions cannot be made; and concurred in the sentiments of Mr. Fox, that 'if by some interposition of Divine Providence, all the wise men who ever lived in the world were assembled together, they could not make even a tolerable constitution!' that is, a constitution adapted to the people which was destined to live under it."

In 1832 he was appointed solicitor-general and was knighted. He held the office until February, 1834, when he was made attorney-general. This position he resigned in November of that year, but was re-appointed in April, 1835, and continued in the active and able discharge of the duties of the first law officer of the crown until June, 1841, when he was appointed lord chancellor of Ireland; to which appointment we shall more fully recur. He sat in the House of Commons from Stafford, as has already been stated, during the years 1830 and 1831; he represented Dudley in Worcestershire from December, 1832, to February, 1834; he was returned from Edinburgh in June of the same year, and continued to represent that city until 1841; at which time he disappeared entirely from the benches of the Lower House, having been elevated to the peerage in June, 1841, with the title of Baron Campbell of St. Andrews, in the county of Fife.

During this period, while engaged in electioneering strife and in political debate, he was laboring and winning triumphs strictly in his professional sphere. The various common law reports give abundant evidence of his skill and success. Always wary in selecting the line of action or of argument to be pursued by him, he advanced towards his object with unerring precision and indefatigable energy; but on few, if any, occasions did he rise to a strain of fervid eloquence, and his lightest and most playful sallies rarely smacked of genuine wit. He did not fence with the polished Spanish blade; no sharply-pointed arrow left his quiver; he fought uniformly with his native heavy claymore, and employed back-handed blows as well as orthodox cut and thrust. Constitutionally calm and calculating, frigid and unassailable by any temporary excitement, his understanding was ever awake to detect

the weakest point both in his own case and in that of his adversary, and sufficiently subtle to weave a veil for concealment of the one, or to seize an instrument wherewith to lay bare the other. The main risk he ran was, either that the juries should observe his cunning and suspect trickery, or that the court, doubting his candor, should deal with him as one of that class of counsel whom it is a duty to distrust. Some of his arguments or speeches subjected him to harsh criticisms and unfriendly insinuations. A marked instance of this was his address before the House of Lords, in behalf of the crown, in February, 1841, on the trial of the Earl of Cardigan, who was charged with firing a loaded pistol at Henry Garnet Phipps Tuckett, with intent to murder, in reference to which it was charged that he had been guilty of joining in a premeditated scheme to insure the acquittal of the prisoner; and it was also alleged that the line of argument pursued by him amounted to a defence of duelling. This charge he solemnly repelled; and subsequently, viewing the matter practically as a man of the world, he vindicated the right of every member of the bar, in defiance of misconception on the part of others, to shape his argument in such a way as may best promote the interests of his client; and he maintained that there is "a great difference between a general approbation of duelling, and an admission that an officer in the army may find himself under the necessity of fighting a duel to preserve his reputation in society, and to prevent disaster from being brought upon himself and his family." His exertions while conducting the prosecutions in 1840, were of great public value, and eminently successful in their results. A formidable insurrection was met, not by a suspension of the habeas corpus act, or any infraction upon public liberty by the enactment of new laws, but simply by the vigorous administration of justice in strict accordance with the ancient constitutional laws of that realm. In more indictments than one, for blasphemous libels, he vindicated the right and asserted the obligation of the civil magistrate to check the circulation of any publication which assailed the foundations of morality by vilifying the Christian religion.

We have referred to the fact that he was appointed Lord Chancellor of Ireland in 1841. A writer in the "Law Magazine," from whose paper we have taken the greater part of this article, thus speaks of this "very critical juncture in the history of Sir John Campbell": —

"The circumstances connected with the transaction were at the time the subject of much remark, and cannot be remembered without a smile. The cabinet, upon the popularity and prosperty of which depended all the hopes of its indefatigable attorney-general, finding itself, about the middle of the year 1841, in an exceedingly precarious position, naturally felt anxious to provide for the dignity and emolument of a high legal functionary, who had long and zealously served the State. The plan originally proposed for the attainment of this end was the enactment of a statute 'for facilitating the administration of justice in equity;' but unfortunately it had been found necessary, in the preceding year, to abandon that scheme, in consequence of difficulties arising in reference to a satisfactory distribution of the patronage which must have been created by the success of the measure. The subject, however, was once more submitted to the consideration of the House of Commons by Lord John Russell, who, when he found that parliament would not admit of its provisions being brought into operation until a few months had elapsed, with some impatience and haste threw up the bill.

"The simple and fair suggestion made to the minister was, that the appointments under the act should be deferred until a new parliament had assembled. It was neither desirable, nor consistent with political usage, that a new and untried modification of the judicial system of the country should be carried into effect, by a ministry which was on the eve of retiring from power, and of being thus withdrawn from all official responsibility; and, accordingly, the current of public opinion ran very strongly against the motives of the ministry in its mode of dealing with its own 'Administration of Justice Bill.' The ministry could not but anticipate its speedy fall. That, however, was no good reason for a vigorous attorney-general permitting himself to be buried in its ruins; and yet such had very nearly been the fate of Sir John Campbell. Confiding in the good-will and power of the minister to elevate him to judicial station, he had taken no precautions to secure his re-election as representative of Edinburgh; so that when the 'Administration of Justice Bill' was withdrawn, he stood, as perhaps he would have said, 'betwixt the de'il and the deep sea.' But hope had not expired, for Lord Plunkett was still alive. If the Irish chancellor, venerable for his years, his eloquence, and the

association of his name with much that is great in the intellectual history of his country, could be quietly moved aside, Sir John Campbell might take his place, and the political puzzle be solved. The most distinguished member of the English bar might well have been proud to hold the seals which dropped from the hands of one of Ireland's true patriots and orators; but, on this occasion, those seals were wrested from his grasp. The negotiation which was immediately opened with his lordship, on the part of the government, proved in the first instance unsuccessful. Lord Plunkett considered it due to the character of the Irish bar, to decline being a party to any arrangement by which Sir John Campbell, however eminent he might be for his knowledge of the common law, should be placed at the head of the equity branch of jurisprudence in Ireland; while, at the same time, he felt the greatest reluctance to sanction a series of proceedings which the public could not but consider as a flagrant job. The affair began to assume a serious aspect; the government was urgent, the Irish chancellor was perverse, and the English attorney-general was uneasy about the possible issue of the conflict. Never had a servant of the crown discharged his official duties with more learning and tact, with more ability and zeal, than had Sir John Campbell during five long and laborious years. His right, according to political and professional etiquette, to advancement, was unquestionable; his claims were paramount, and such the ministry admitted them to be; but men of honor instinctively shrink from undue precipitancy in unceremoniously dismissing one public servant simply to make room for another. No time, however, could be lost, and more energetic measures were accordingly adopted. There was indignation in Dublin and distraction in Edinburgh; even the address of his colleague, Mr. Macaulay, had been for a few days withheld, in the hope of his receiving intelligence as to the course contemplated by the attorney-general, with a view to their starting fairly abreast, and reaching the goal together in triumph.

"It was at this critical moment that Lord Ebrington appeared upon the scene, and succeeded in extorting from Lord Plunkett the resignation of his high office. The communication of the lord lieutenant, though in form a request, was in substance and spirit a command. No judge, no man of honor, could, without degradation, hold for a single day the Irish seals, after having received the letter of Lord Ebring-

ton, who requested as a particular favor to himself that Lord Plunkett should resign, and condescended to enforce his application by an allusion, in no ambiguous terms, to the many favors which had been conferred by the government upon the Lord Chancellor of Ireland. A remonstrance from such a quarter and couched in such language, was decisive. Lord Plunkett immediately put himself into communication with Lord Melbourne and forwarded to the Home Office his resignation of the Irish seals.

"In the meantime Lord Plunkett was not allowed to withdraw in silence; words of respect and sympathy met him on all hands; and if any circumstance could have soothed the irritation and chagrin produced on his mind by the haste and wanton harshness with which his resignation was pressed upon him, he must have been in some measure reconciled to his lot by the language addressed to him, on the part of the Irish bar, by Mr. Sergeant Greene, who, as representing that body, expressed the deep sense which every member entertained of the ability, learning, patience, and assiduity which had marked his lordship's administration of the high office which he had so long filled, with honor to himself and to the profession. In the course of the very brief remarks which dropped from his lordship in reply, he, after alluding to the fact that the advanced period of life at which he had arrived must of itself have induced him, at no distant period, and independently of the events which had happened, to retire from public life, observed: 'With regard to the particular circumstances which have occasioned my retirement, I think it a duty which I owe to myself and to the members of the bar to state, that for my retirement, on this occasion, I am not in the smallest degree answerable. I have neither directly nor indirectly sanctioned it; and in giving my assent to the proposal which was made to me of retiring, I was governed solely by its having been requested of me as a personal favor to do so, by a person to whom I owe such deep obligations, that an irresistible sense of gratitude made it impossible for me to do anything but what I have done.'

"The exit necessary to the regular development of the plot in the progress of this politico-judicial interlude having been arranged, the piece, supported by the coolness and skill of the actors, ran on smoothly and successfully to its very pleasant *denouement*, the retirement of the hero into private life, with a pension of £4,000 per annum. The very strong feeling of

dissatisfaction which prevailed among professional men in Ireland, could not be concealed. The junior members of the Irish bar were roused into indignation at a proceeding which they chose to interpret as an insult to their entire body; nor were they altogether restrained from the expression of their sentiments by their graver and more calculating seniors. With more zeal than discretion, a requisition, to which the latter class declined being a party, was prepared and signed by the young barristers; and in furtherance of it, a meeting was held at the 'Four Courts,' with a view to taking into consideration the measures which ought to be adopted in consequence of the appointment of Lord Campbell to the Irish seals. These gentlemen repudiated the notion that their remonstrance could be regarded as unconstitutional; it was, they maintained, demanded by every consideration of self-defence, inasmuch as the privileges of the bar had been infringed.[1]

"Whatever difference of opinion may exist concerning the policy or imprudence of the course pursued by these individuals, and the principle of selection which they would have prescribed to the ministry of the day, there can be no doubt that in Dublin a very strong feeling prevailed against the appointment of Lord Campbell to the Irish seals. Those who were unwilling to withhold from him the tribute of praise which he had earned by his industry and talents, could not be reconciled to the unscrupulous precipitancy with which the arrangements had been concluded. The notoriously precarious position of the cabinet gave much meaning and weight to the storm of discontent, amounting in some instances to disgust, which burst forth from the public press of England and Ireland. So deep was the unfavorable impression produced upon the minds of tory, whig, and radical, that much lukewarmness was anticipated on behalf of the ministerial interest at the elections, which were not far distant. But while all

[1] The first resolution sanctioned by this assemblage of Irish barristers, was "Resolved, that, inasmuch as all judicial appointments in England are made from the English bar, so all judicial appointments in Ireland ought to be made from the Irish bar." Another objection taken by the meeting to Lord Campbell, was, that he had no acquaintance with practice in equity, and that they would really have to instruct him in its very elements before they could submit to his decisions. We conceive it to be due to the character of the senior members of the Irish bar to state, that besides declining to attend the meeting referred to, they drew up and published a protest against the above resolution.

these explosions of patriotic and professional wrath had well-nigh frightened the isle from its propriety, Lord Campbell was quietly preparing himself for a visit to Ireland; a visit which he knew was to be a very short one, and which, although it could not fail to assume, with reference to some of its accompaniments, a sort of mock solemnity, he further knew was to be followed by a speedy retirement and a substantial reward. Accordingly, on the 28th of June, Lord Campbell landed at Kingston, and proceeded to the Irish capital. On the 2nd of July, the inner and outer bars of the court of chancery were crowded with members of the profession, all anxious to catch a glimpse of Lord Plunkett's successor. The new chancellor having entered the court, about eleven o'clock, intimated that he could only hear short causes before closing the sittings: he heard one or two such causes; and, on the following day, along with the sittings, closed the judicial career in Ireland of Lord Campbell; having held the office of Lord High Chancellor of Ireland for the period of sixteen days.

"Before the end of July he had taken his departure for England, leaving behind him not one single trace of official duties discharged or public benefits conferred. At the conclusion of the sittings, no doubt after Term, he delivered an address to the bar on the necessity of reform in the administration of justice in courts of equity; a topic which must have sounded strangely in the ears of men who had recently avowed, whether correctly or in error is quite another question, that they had no confidence in his knowledge of the science which it was his duty to expound and apply."

The whole structure of Lord Campbell's mind, as well as the habits which he had through life carefully fostered, proved his safeguard during the interval of his retirement from the judicial office. As a peer of the realm, he applied himself conscientiously to the discharge of his parliamentary duties, a portion of which was the hearing of appeals from the inferior courts. Before the lapse of many years he gave to the world ample evidence of his industry in a new sphere. His early attraction towards literature sprang up anew, and yielding to his impulses, he set himself to work on legal biography. The first series of his "Lives of the Lord Chancellors and Keepers of the Great Seal of England" was published in 1845, and his "Lives of the Justices of England" appeared in 1849. These volumes acquired some notoriety and some popularity

on their first appearance, but they are full of such defects in substance and style as will prevent them from ever taking a permanent position in literature. The reputation of Lord Campbell as a writer of legal biography, may, perhaps, be gathered from the epigrammatic remark attributed to a distinguished lawyer and statesman, that "it would add to the horrors of death to think that Lord Campbell should write his biography."

In 1850, upon the resignation of Lord Denman, whose failing health no longer permitted him to bear the heavy burdens of the office, Lord Campbell was appointed Chief Justice of the Queen's Bench; and took his seat in court on the first day of Easter Term. His legal knowledge, his thorough familiarity with all the details of practice in the courts of common law, the experience of a long professional life, admirably qualified him for the high office to which he had been elevated. He speedily gained the confidence of the bar and the public, and by his skill, his urbanity, and his respectful attention to the suggestions of his colleagues on the bench, as well as by his kind forbearance towards even the youngest member of the bar, he day by day inspired men of all parties with confidence in the integrity and general correctness of his decisions.

A writer has suggested some criticisms upon Lord Campbell's manner in jury trials. He says, "Though there is no reason for thinking that Lord Campbell was unfair towards litigants, yet it is our opinion, as well as that of many who had good opportunities for judging, that at *Nisi Prius* and in the criminal courts, he exercised more art than was consistent with candor in swaying juries, and thus unduly affecting verdicts. It used to be said, by the leaders who felt and saw this with indignation, 'You can't lay hold of him;' and indeed he generally conveyed his impression by manner and emphasis. He was wont ominously to shake his head, solemnly lifting his hand in a warning attitude, saying, '*But*, gentlemen, YOU must judge of this piece of evidence. It *may* be true, and then God forbid that we should disbelieve the testimony to the detriment of the defendant. But it is your duty to say if you do and if you *can* give credence to the statements I have just read. Gentlemen, I have read it to you;' and then looking over his spectacles with a countenance which filled every juryman's mind with skepticism as to the evidence before them, he would add — 'It is *your* province, and not

mine, to decide what value, as men of intelligence and experience, you can attach to this kind of evidence.' No judge whom we ever heard, attempted in summing up by tone, gesture, and by-play, points which one could not adduce in moving for a new trial, to influence juries, so much as the late Chief Justice of the Queen's Bench."

"Another of his qualities, which is less admirable in a judge even than the one just mentioned, was the habit of seeking for applause from the audience. He positively coveted the clapping of hands and the cheers of bystanders. Some common-place piece of clap-trap, about 'the danger of Popery,' or 'our glorious constitution,' was addressed to the surrounding public, and reiterated when it had produced the welcome round of applause."

Lord Campbell continued Chief Justice of the Queen's Bench until 1859, when he was promoted to the chancellorship. In this office he had but a short time to earn reputation as an equity judge, and his cautious character and painstaking habits prevented him from committing himself on the few occasions in which he had the opportunity of so doing. He was rather disposed, it would seem, to take the safe course on appeal cases, and affirm the decrees of the court below. But he no more flinched from work as chancellor than as chief justice. No one could charge upon him that he ever spared himself trouble. Labor was to him not only a duty, but a habit, and probably a pleasure. With the exception of showing bad taste in commenting upon Vice Chancellor Wood's judgments, while he occupied the post of chancellor, he cast no discredit on that high office.

The entire life of Lord Campbell was one of continuous labor, of much thought in solitude, and of harrassing anxiety in his public avocation. Sooner or later, this unrelaxed tension of the mental faculties leaves behind it traces of greater exertion than the human mind can healthily bear; he seemed, however, to have been by nature formed for endurance. Tall and stoutly built, he was, when young, the very impersonation of athletic power. No stranger even, who passed him hurrying along of an evening to his chambers in the Temple, could have mistaken the earnest nature and active habits of the man, who, with a gentle stooping of the shoulders, and eyes fixed thoughtfully on the ground, strode along heedless of, and undisturbed by, the moving scene around him. In court, however, his attitude was erect as his manner

was bold. On all occasions he proved true to the spirit of his motto,—*Audacter et aperte*. His great merits as an advocate were clearness of apprehension and natural shrewdness; but they occasionally degenerated into cunning and trickery, more or less plausibly veiled. Without possessing any extraordinary ingenuity, he displayed closeness of reasoning, directed and illustrated by suggestions drawn from more than an average stock of legal knowledge. Not a ray of what is called genius warmed his soul or irradiated his style. Even in his most ambitious efforts, his most ardent admirers could discover not one of those elements which have rendered memorable the orations of Erskine or Brougham in England, or of Curran in Ireland; and still less a particle of that playful fancy and sparkling imagery which, dropping from the lips of Francis Jeffrey, threw a halo for a time around the bar of Scotland. A certain awkwardness of conception and of manner seemed inherent in him; but he in a great measure succeeded "in clearing his tongue of his native pronunciation." He never, though some of his speeches are highly and carefully labored, reached the point of what has been significantly called "cumbrous splendor." They are specimens of strong common sense, conveyed in direct, unaffected, vigorous language. They are rational, but totally unimpassioned, and are not calculated to inspire, as they certainly did not spring from, the glowing impulses of the genuine orator.

He was a consistent party man; and the consistency of his conduct, in political warfare, was by his friends ascribed as much to his sense of moral integrity as to the vigorous grasp his mind had, in early life, taken of the leading doctrines of his political creed. But, holding strong party views, he was never a political bigot. He showed but little sympathy with the party latitudinarianism of the present day; believing the truth enunciated by a profound historical writer, that "There is something more sacred than prerogative, or even than the constitution,—the public will, for which all powers are granted, and to which they must all be referred." "*Salus populi suprema lex*," was Lord Campbell's watchword through the whole of his long career. Political rivals repeatedly bore testimony to his enlightened, liberal, and moderate views. In parliament, he professed himself to be an advocate for fair dealing, and to shrink from taking advantage of opponents. He affirmed, also, that he held in proper abhorrence all "catching bargains;" and in the arrangement of matters

affecting only himself, personally or professionally, he frequently protested that he was ready to waive his claims, if by so doing he could promote the public convenience.

At no period of his career did Lord Campbell submit to being made the tool of a party. On all occasions he vindicated his independence by thinking and acting for himself. On the occasion, for instance, of the debate on the Reform Bill, he submitted to the consideration of the House of Commons views not generally approved by the party with which he acted. This self-respect sprang from, and was proof of, the intrepid manliness of his character. After he became a member of the Upper House, he felt himself to be less than ever bound by the trammels of party, and he found freer scope for his matured opinions and his enlarged constitutional views. In questions involving points of law, he offered his opinions with those of Lord Lyndhurst and Lord Brougham. But he failed to acquire that influence over the minds of the members of the Upper House which either of these ex-chancellors commanded; he was not even certain that his remarks would be received with candor and attention. For this occasional apparent indifference on the part of the peers to Lord Campbell, for the coldness of a reception which might otherwise have been genial, he had himself in a great measure to blame. He seemed to forget that the tone of sentiment prevalent in the House of Lords, is totally different from that temper which pervades the ambitious, calculating politicians of the House of Commons. In the course of his life he uttered bitter sayings concerning the deliberations and decisions of the peers; and such ebullitions, dropped from him during party debate, might still have been remembered to his disadvantage. On other occasions, however, he made ample reparation for the few violent sentiments which escaped from him under the excitement of parliamentary reform.

To what did Lord Campbell owe his great success? First of all he was a strong man, with a hard head, a fine digestion, and good circulation. He was canny, persevering, industrious, and self-reliant. He never conceived so high a standard of excellence as to be disgusted or dismayed with himself for falling short of it. He was, moreover, a lucky man apart from his great qualifications. His was the triumph of mediocrity; and by living eighty years and by preserving his natural constitution, his capacity for work, and his connection with politics and party, he achieved the highest position which the profession offered.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

SUFFOLK COUNTY.

DAVID W. CHILD *v.* THE CITY OF BOSTON.

Where the mayor and aldermen of a city, under the provision of a statute, authorizing them "to lay, make, maintain, and repair all main drains or common sewers," and of ordinances relating to the subject, adopt a plan of drainage, the city is not liable for damages arising from any defect or want of efficiency in the plan adopted.

The aldermen, in such case, are required to act, not as agents of the city, nor in any manner under the direction of the city, but as public officers; and their duty in this respect, is of a quasi judicial nature.

Where a special authority is conferred upon the mayor and aldermen of a city, and accepted by the city, involving important relations to individual proprietors of land, and the entire control of an easement of such a nature that negligence might not only deprive those interested of a benefit it was designed to afford, and for which they had paid, but produce consequences actively and directly pernicious, a private action may be maintained against the city, by any person suffering damage from the negligence of the city, in the exercise of its duty under such authority.

Thus where the care and maintenance of a common sewer, already built, devolve wholly upon a city, without any private person having any power to interfere with it, the duty to keep the sewer free from obstructions is a ministerial duty resting upon the city, and it is liable for negligence in the exercise of such duty to any person to whom such negligence has occasioned an injury.

The duty of the city of Boston in regard to particular sewer, discussed and stated.

Whether, if, after adopting a plan of drainage, the board of aldermen should direct a change in such plan, the city would incur any liability, or be bound to make any compensation to abuttors, for the expenses of raising cellars and yards made necessary by such change in the system of drainage, *Quaere.*

This was an action of tort, in which the plaintiff seeks to recover damages of the defendant under the following circumstances: The plaintiff is the owner of a house and lot of land on Dover Street, in the city of Boston, which he holds through several mesne conveyances from Edward Tuckerman; and his estate is part of the parcel of land described in the tripartite indenture between the city of Boston, Edward Tuckerman and others, and the Boston and Roxbury Mill Corporation, referred to in the opinion of the court. This estate was formerly drained into the empty basin in the Back

Bay, so called, the empty basin lying to the west of Tremont Street and the estate of the plaintiff, through a sewer built jointly by the city of Boston and Tuckerman. In the year 1841, the legislature passed (ch. 115) "An act in relation to main drains and common sewers," which provided, sect. 1, that "The selectmen of the several towns, and the mayor and aldermen of the several cities in the commonwealth, may lay, make, maintain, and repair all main drains or common sewers in their respective towns and cities; and all the main drains or common sewers which have heretofore been or which may hereafter be constructed by any town or city, shall be taken and deemed to be the property of such town or city." Section 2 is as follows: "Every person who may hereafter enter his particular drain into any main drain or common sewer, so constructed as aforesaid, for the drainage of his cellar or land, or in obedience to the by-laws or ordinances of the town or city, or who, by any more remote means, shall receive any benefit thereby for draining his cellar or land, shall pay to the town or city a proportional part of the charge of making," &c. &c. Section 6 provided, "That this act shall not take effect in any city or town until it shall have been accepted by the legal voters of any town, at a meeting called for that purpose, or by the mayor and aldermen and common council of any city." The other portions of the act relate to the ascertaining and assessment of the charges for entering particular drains into the main drain or common sewer upon the proprietors, &c., and are not material to this case.

This act was accepted by the city of Boston in 1841.

Some of the provisions of the City Ordinances upon this subject, are as follows: — "All particular drains, which shall hereafter enter such common sewer, shall be built of such materials as the board of aldermen shall direct, and shall be laid under the direction of said board; and they shall be laid in such direction, of such size, and with such descent, and, when required, with such strainers as they shall require.

"The board of aldermen shall have power in all cases where there is any common sewer in any street or highway, to cause every owner of land adjoining such street or highway, his agent or tenant, to make a sufficient drain from his house-yard or lot, whenever, in their opinion, the same shall be necessary," &c. &c. Other provisions of the City Ordinances are referred to in the opinion of the court.

In 1850-51, the city of Boston, under an order of the mayor and aldermen, particularly referred to in the opinion of the court, built a common sewer in Tremont Street, extending northerly and southerly from Dover Street (Tremont Street running in a northerly and southerly direction, and Dover Street running in an easterly and westerly direction, and its westerly end terminating in Tremont Street); and also a common sewer connecting with the one in Tremont Street, and running easterly through Dover Street to the South Bay, so called, and emptying near the South Boston Bridge in Dover Street, which latter sewer cut the drain of the plaintiff before mentioned. Ordinarily, the only outlet to the sewers aforesaid, was in the South Bay as aforesaid, and at a depth of some feet below high water; but there was a waste weir put into the sewer in Tremont Street, at the time it was built, which opened into the empty basin aforesaid, and through which the water in the sewer would discharge into the empty basin when the outlet of the sewer in the South Bay was closed by the tide, and the water in the sewer had risen high enough to reach the waste weir. The drain of the plaintiff was connected by the city with this sewer at the time it was built. Some time subsequent to the building of the new sewers in Tremont Street and Dover Street, the house of the plaintiff, which previously had been perfectly drained, and had never suffered from dampness, was flooded with drain water in the lower story, and has since been so flooded several times; of which fact the city officers were repeatedly notified by the plaintiff.

The defendant admitted that the waste weir into the Back Bay was closed up by the Boston Water Power Company at some period before the action was brought, by filling in against the same, and that a part of the damage done the plaintiff was thus occasioned; but contended that the whole damage of the plaintiff was not caused by closing this waste weir. The plaintiff waived any claim for damages for any other cause; and contended on the evidence that allowing the waste weir to be closed, was, under the circumstances, such negligence on the part of the defendant as entitled the plaintiff to recover in this action; and that on the evidence the whole damage was thus caused.

The court instructed the jury as follows: "If the city of Boston has constructed a drain or common sewer in Dover Street, into which the private drain of the plain-

tiff's estate is entitled to enter and is required by the City Ordinances and regulations to enter, and have so constructed it with a waste weir discharging into the Back Bay, which waste weir was intended to provide, and was necessary, for the best discharge of the water from the drain in certain states of the weather and of the tides, and if the city had a right thus to provide for the discharge of the sewer through such waste weir into the Back Bay, that then, if after the sewer was built and the private drain of the plaintiff entered therein, the city, without notice to the plaintiff, negligently allowed the waste weir to be filled up and obstructed so as thereby to set back the water upon the plaintiff's land, the city would be answerable for the damages thereby occasioned to the plaintiff's estate."

It was admitted that for two years before the action was brought, the waste weir had been obstructed by the Water Power Company, and that the city, although notified that the plaintiff's estate was flooded from the sewer, had taken no measures to clear it; which the court ruled was evidence of negligence sufficient to authorize a verdict for the plaintiff on the question of negligence. The court also ruled for the purpose of the trial, that the city had a right to drain into the Back Bay through the waste weir, by virtue of the tripartite indenture heretofore referred to.

The jury found a verdict for the plaintiff, and the court reported the case, under an agreement that, if the foregoing instructions are correct, judgment is to be rendered for the plaintiff upon the verdict; otherwise the verdict is to be set aside and a new trial granted.

The case was argued three times by *P. W. Chandler* and *George O. Shattuck* for the plaintiff, and by *J. G. Abbott* and *J. P. Healey* for the defendant. The substance of the arguments, and some of the principal cases cited, appear in the opinion of the court, by

Hoar J.—This case has been three times argued, and has received from the court that full consideration to which it is entitled, not only from the large interests involved, but from the intrinsic difficulty of the questions which it presents.

The common sewer into which the plaintiff's drain entered, and from which the water was set back upon his land, was constructed by the city of Boston, under an order of the mayor and aldermen, passed on the 8th of July, 1850. The right and duty to make, maintain and repair common sewers,

were governed by stat. 1841, c. 115; and the 6th section of the act provided that it should not take effect in any city until it should have been accepted by the mayor and aldermen and common council thereof. The act was accepted by the city council of Boston, April 5, 1841.

The order of the mayor and aldermen required that the sewer should be constructed in conformity with a plan of drainage for the southwestern portion of the city, reported in City Document No. 14 of the year 1850, by Messrs. Chesbrough and Parrott; and it appears from that report that the drainage of that locality presented peculiar difficulties. The grade of Dover Street, upon which the plaintiff's house stood, was below the level of the sea at high water; and any drainage from it into the sea was therefore impossible, except at low stages of the tide. The plan adopted was, to furnish the outlet of the sewer with a flap or gate, which would open to allow the discharge of water at low tide, but which the rising tide would close, and thus prevent the reflux of the salt water. And it was supposed that the capacity of the lower part of the sewer, near the outlet, would be sufficient to contain all that would be required to pass into it from private drains and from the street gutters, under ordinary circumstances, until the ebb of the tide would allow its discharge into the sea. But whenever heavy rains, or melting snows, should suddenly increase very much the quantity of water flowing into the sewer, at a stage of the tide when the outlet was closed by the gate, it was obviously necessary to take some other measures to prevent the overflow from the sewer through the private drains, into the houses, cellars and yards of the abuttors upon the street. With this view, the report of Messrs. Chesbrough and Parrott contained a suggestion to the following effect: "In order to guard the basements and back-yards of these houses from inundation by heavy rains during high tides, it will be necessary to have one or more waste weirs, discharging from the main on Tremont Street into the empty basin, and placed at such a level as to act only when the sewers are filled to overflowing, either from heavy rains or from the flaps getting out of order, and letting in the tide.

"Should the empty basin ever become covered with houses and streets, this plan of wasting surplus water into it could not be continued. In that case, we see no practical remedy except pumping, for preventing the inundation of the base-

ments and back-yards of houses in the lowest parts of the district, should heavy rains occur during high tide; unless, indeed, the streets are raised high enough above the tide to turn the water in that direction, either by surface or underground drainage."

This was the particular method proposed; and it was in conformity with the fifth recommendation of the report, "For affording a permanent and safe system of drainage," which was as follows: "That the low portions of the district, which are already improved, be protected, as far as possible, from inundation, by such temporary expedients as are practicable, until a judicious plan of raising them to the height proposed can be adopted and carried out."

The commissioners, in another part of their report, expressly state that they "are not prepared to recommend a resort to pumping;" and the result of the whole scheme was therefore this: to adopt the plan of a waste weir into the empty basin as a temporary expedient, so long as drainage in that direction should continue practicable; and as a last resource, to require a raising of the grade of the street, and of the lands adjoining, to such an extent as to admit a more perfect drainage by discharge into the sea.

The jury were instructed at the trial that the city had the right, under the tripartite indenture between the city of Boston, Edward Tuckerman and others, and the Boston and Roxbury Mill Corporation, to maintain the waste weir, and drain through it into the empty basin; and we think this instruction was correct. The language of that instrument conferred a very broad and comprehensive right, under a covenant in these terms: "The said Boston and Roxbury Mill Corporation does hereby covenant, grant, and agree, that the said parties of the first and second part, their respective successors, heirs and assigns, shall have and enjoy forever the right to dig, lay and maintain all convenient and necessary sewers or drains from the upland to the channel or deep water within the basin, according to law, and the common and usual practice for the time being within the city." This was clearly intended, and must be construed to apply, not only to the wants of the city as a private owner of lands in the neighborhood, but also to the sewers for general use, which it might be their duty, in their municipal capacity, to construct and maintain.

The report of Messrs. Chesbrough and Parrott contained

a plan of the sewers which they recommended, and a full specification of the kind and amount of materials necessary to their construction; and the sewer in Dover Street was completed in precise conformity therewith. No defect or want of repair in the sewer itself has been discovered since it was completed; but the obstruction which caused the injury of which the plaintiff complains was occasioned by the filling up of the flats owned by the Boston Water Power Company, between the mouth of the waste weir and the channel of the empty basin, and the failure to extend the sewer through the solid land thus created.

The question whether the defendants are liable at all for the condition of the sewer, and if so, upon what grounds, is one certainly not free from difficulty. It was built, not by their direction, as a municipal corporation, but by the order of the mayor and aldermen, who act upon many subjects as an independent board of public officers, intrusted with a large discretion, and appointed by law to exercise an absolute and exclusive control upon matters within their jurisdiction. The statute provides that the mayor and aldermen may lay, make, maintain and repair all main drains or common sewers in the city. The City Ordinance requires all particular drains which enter a common sewer, to be laid under the direction of the board of aldermen, and to be built of such materials as they shall direct. All the main drains and common sewers are made the property of the city or town in which they are built, and the cost of their construction and repair is to be assessed upon the owners of lands benefitted by them, except such proportion as by by-law, ordinance or otherwise, may be required to be paid by the city or town, which in Boston is to be not less than one quarter part.

Upon mature deliberation, we are all of opinion that the defendants are not responsible for any defect or want of efficiency in the plan of drainage adopted, although it might expose the plaintiff to incidental inconvenience. If the plaintiffs chose to build their houses below the level of the sea at high water, it was manifestly impossible that the discharge of drains into the sea should be at all times perfect and unobstructed. The duties of the aldermen in directing what drains should be built, and where they should discharge, were of a quasi judicial nature, involving the exercise of a large discretion, and depending upon considerations affecting the public health and general convenience. They were re-

quired to act, not as agents of the city, or in any manner under the direction of the city, but as public officers. If, in the exercise of their judgment, it appeared to them best that the sewer should be built wholly above the level of tide water, the private drains which were required to enter into it must of course be placed at a corresponding elevation; and it would follow as a necessary consequence that the grade of the cellars and yards adjacent must be raised to the like extent, or that drainage could only be allowed from the upper part of the houses.

But after a common sewer is built, and until some change in its location or construction is directed by the board of aldermen, its care and maintenance devolved wholly upon the city, who provide for keeping it in order through such agents and officers as they choose to select and appoint. The superintendent of common sewers, the officer designated for this purpose in the city of Boston, is chosen by the concurrent vote of the two branches of the city council, is removable at their pleasure, and receives such compensation as they determine.—City Ordinances of Boston, 1856, p. 487. The sewer is the property of the city, and no private person has any power to interfere with it. The abuttors pay such sums as are assessed upon them for its construction, and the benefit which they receive from it is the only return for this contribution. The charge of sewers and drains is not an obligation imposed upon the city by legislative authority, exclusively for public purposes, and without its corporate assent. It was voluntarily assumed, by the acceptance of the act conferring the power.

These circumstances seem to the court to distinguish this case from the class of cases in which it has been held that a private action cannot be maintained against a city or town, unless such an action is expressly given by statute, for negligence in the discharge of a public duty, the performance of which is required of all such corporations alike. *Mower* v. *Leicester*, 9 Mass. 247; *Bigelow* v. *Randolph*, 14 Gray, 541. Here a special authority was conferred and accepted, involving important relations to individual proprietors of land, and entire control of an easement of such a nature, that negligence might not only deprive those interested of a benefit which it was designed to afford, and for which they had paid, but produce consequences actively and directly pernicious. The duty to keep the sewer free from obstructions was a ministerial duty, and the defendants were liable for

negligence in its exercise to any person to whom their negligence occasioned an injury. *Mayor &c. of New York* v. *Furze*, 3 Hill, 616; *Wilson* v. *Mayor &c. of New York*, 1 Denio, 595; *Eastman* v. *Meredith*, 36 N. H. 284, and cases there cited.

This brings us to the last question for decision, which is, perhaps, the most doubtful which the case presents. The injury to the plaintiff was caused, not by any defect in the sewer as originally built, nor by any want of repair; but by an obstruction at the mouth of the waste weir, filling up the place of discharge, and thus effectually closing the orifice through which, in times of freshet, the surplus water was designed to flow. It is argued for the defendants that this does not come within the just limits of their responsibility; that if they built the sewer in conformity with the order of the board of aldermen, kept it in repair, and free from internal obstruction, they could not be answerable for the filling up, by another party, of the part of the basin where the sewer emptied; that what was needed to remedy the difficulty was in fact an extension of the sewer, which they could not be required to undertake until the board of aldermen had made an adjudication upon its necessity, and directed it to be built. It was in reference to this position, which is certainly plausible, that the last re-argument of the case was ordered. But upon examination, we do not think it can be supported.

In determining what it was incumbent on the city to do, in the construction and maintenance of this sewer, regard must be had to all the circumstances existing at the time when the order was passed under which it was built. The city knew that the Boston Water Power Company owned some flats between Tremont Street and the channel of the Empty Basin, and that they were likely to fill them up. This appears from the report of the committee of the aldermen, in pursuance of which the order to build the sewer was adopted. That committee say, "At this very moment, some of the principal sewers in the vicinity of Dover Street are obstructed by the earth which has been thrown into the Empty Basin, under the direction of the Water Power Company, on the westerly side of the Tremont road, in order to bring their property into use, and their contents are fast creating a grievous nuisance by permeating through it." This was one of the chief evils which the plan of drainage recommended was intended to obviate. The committee further say, that the sewers which they propose "will be self-acting, effective,

and undoubtedly sufficient for the entire house and surface drainage. Whatever inconveniences might be apprehended from the sudden flowing in of back water, have been provided for by flaps at the outlets, and a waste weir on the Empty Basin." It is obvious from these statements that the plan contemplated an effective discharge from the waste weir into the channel or deep water of the Empty Basin; to be carried through any intervening obstruction, and only to cease or to require a new provision or adjudication of the board of aldermen, when the territory of the basin should be substantially covered with houses and streets. It is true that the report of the engineers contained an estimate of the materials necessary to complete the sewer; and that the committee of the board of mayor and aldermen, in November, 1850, reported that it was completed.—City Document, 1850, No. 34. But with the liability to have the flats filled up at the outlet, and the right of the city to extend its drains through them, when thus filled, we think the original order of the mayor and aldermen to construct the sewer upon the plan proposed, must be construed as requiring it to be made continuously effective for the discharge of water into the basin; and that if not extended at first as far as the Water Power Company had a right to fill, that was to be regarded as a temporary omission, for the sake of present economy; but which left the obligation upon the city, as the owner of the sewer, and charged with its maintenance, to keep it in operation and open to the edge of the upland, as the gradual changes in the shore might from time to time require. This being comprehended in the order first passed, no new order or direction was necessary to give it binding force.

As the instructions given to the jury at the trial were correct, the plaintiff is entitled to judgment. It will be sufficiently apparent from the observations already made, that the court do not intend to intimate, that, if the board of aldermen had passed an order directing the waste weir to be closed, the defendants would have incurred any liability, or would have been bound to compensate the abuttors upon Dover Street for the expense of raising the grade of their cellars and yards, which such a change in the system of drainage might render indispensable. But while that system remained unchanged, we are of opinion that they were liable for damages occasioned by negligence such as the present action discloses.

Judgment for the plaintiff, on the verdict.

Charles Merriam *v.* John W. Walcott *et al.*

A person purchasing a note of a broker for cash, and taking the note by delivery, can recover back the money paid if it turns out that the maker's signature is forged, on the ground of an implied warranty that the note is in reality what it purports to be.

The broker making the sale as a broker, but not disclosing the name of his principal, is liable as principal.

The fact that he has paid to his principal the money received for the note before any demand was made upon him to make repayment, there having been no unreasonable delay in giving him notice of the forgery after it was discovered, does not relieve him from liability.

The fact that the purchaser of the note shared the broker's commissions, *i. e.* reckoned in half the broker's commissions as part of the amount to be discounted on the notes, does not create a partnership between the purchaser and the broker in the commissions, nor does it relieve the brokers from their liability.

Action of contract. The plaintiff bought of the defendants, who are brokers, a promissory note, upon which the signature of the maker's name proved to be a forgery. The plaintiff discounted from the note interest equal to twelve per cent. per annum, and also one half the commission of the brokers, and paid the remainder to the defendants. The defendants did not disclose their principal, and they paid over the money to him before any notice of the forgery. The plaintiff brought this action to recover the amount of the note. The other facts of the case sufficiently appear in the opinion of the court by

Chapman J. — The first question presented by this case is, whether a party who purchases a note of a broker for cash, and takes the note by delivery, can recover back the money paid, if the maker's signature turns out to be forged. The text books state the law to be that he can recover it back on the ground of an implied warranty that the note is in reality what it purports to be. Bayley on Bills, 148; Chitty on Bills, (10 Amer. Ed.) 245; Story on Notes, 126. The English cases are referred to in these treatises. The recent case of *Gunney* v. *Womersley*, 4 El. & Bl. 132, asserts the same doctrine. It has been repeatedly held in New York. *Markle* v. *Hatfield*, 2 Johns. 455; *Herrick* v. *Whitney*, 15 *ib.* 240; *Shaver* v. *Ehle*, 16 *ib.* 201; *Murray et al.* v. *Judah*, 6 Cow. 484; *Canal Bank* v. *Bank of Albany*, 1 Hill, (N. Y.) 287. It is so held in Rhode Island. *Aldrich* v. *Butts*, 5 R. I. 218. Also in Vermont. *Thrall* v. *Newell*, 19 Vt. 202. But there are two cases which state a distinction in respect to

this implied warranty that is not recognized in the other cases. The first is *Ellis* v. *Wild*, 6 Mass. 321. The plaintiff had purchased of the defendant two promissory notes, both of which, without the knowledge of either party, had forged endorsements. They were taken in payment for a quantity of rum. The court held that if it was the original intent of the plaintiff to buy the notes to make payment in rum, the defendant was not liable; but if the payment by the notes was not a part of the original stipulation, but an accommodation to the defendant, then he was liable on the ground that he had not paid for the rum. Some early English cases are referred to as authority for this distinction. The other case is *Baxter* v. *Duncan*, 29 Maine, 434, and it states the same doctrine. If this is the law of this commonwealth, then the plaintiff cannot recover, for he bought the notes for cash, and did not take them in payment for a debt. But it is difficult to see any valid reason for such a distinction. Whether the purchaser pays cash or discharges a debt in payment for the forged paper, the injury is the same to him. There is in both cases a failure of consideration growing out of a mistake of facts. The actual contract and the implied understanding as to the genuineness of the note is in both cases the same. And we think that the authorities which hold the seller to an implied warranty in each case that the note is genuine, are in conformity with the principles of sound reason and justice, and with the understanding of the parties in making such a contract. In *Cabot Bank* v. *Morton*, 4 Gray, 156, the case of *Ellis* v. *Wild* is not noticed; but it is held that one who gets a note discounted at a bank, not endorsing it, impliedly warrants that its signatures are genuine. The two cases are therefore contradictory. The doctrine held in *Lobdell* v. *Baker*, 1 Met. 193, in effect goes beyond any of the cases cited. The note sold was endorsed by a minor. It was held that upon the sale there was an implied warranty that the endorsement was by a person capable of binding himself by a valid contract. A warranty which goes to that extent includes the idea that there is a genuine signature. In that case the note was not sold to pay a debt, but for cash, and that point was not regarded as material.

2. Another question raised is whether the fact that the defendant made the sale as a broker, but without disclosing the name of his principal, relieves him from his liability.

The authorities establish his liability as principal. 2 Kent's Comm. (6th ed.) 630; *Gunney* v. *Womersley; Canal Bank* v. *Bank of Albany; Cabot Bank* v. *Morton;* above cited.

3. A third question is whether he is relieved from his liability by the fact that he had paid out the money to his principal before it was demanded by the plaintiff. We think he is not, there having been no unreasonable delay in giving him notice of the forgery after it was discovered. *Canal Bank* v. *Bank of Albany, ubi supra.* And we think the deduction made to the purchaser of the notes does not alter the nature of the transaction. It did not, as the defendants contend, create a partnership in the commissions, but merely fixed the amount to be paid for the notes.

Judgment for plaintiff.

Henry C. Hutchins, for plaintiff.

J. G. Abbott and *J. M. Keith*, for defendants.

NORFOLK, ss.

At Chambers in Boston, June 16, 1851.

Present—SHAW C. J., and DEWEY, METCALF, FLETCHER, and BIGELOW, Justices.

JOEL TALBOT *et al. In Equity, v.* ANSEL P. CURTIS *et al.*

In this commonweath, where there is a probate guardian, the court will not appoint a guardian *ad litem.*

Where in a will the trustees were empowered to "dispose of so much of the principal as may be necessary," *Held*, that the word "principal" meant and intended "real estate."

The bill, brought by the two trustees under the will of one Thomas Curtis, to obtain the construction of said will, as to whether the trustees were authorized, in the events which had happened, to sell real estate in order to obtain funds with which to perform the duties enjoined upon them by the will, was filed June 3, 1851. A subpœna was issued on the same day, returnable at the Rules Day, on the first Monday of July, 1851, and was served by a deputy sheriff on two of the defendants, who were of full age; upon the defendant, Hannah P. Lothrop, a minor, by a copy in hand, and by reading the same to Francis B. Crane, her probate guardian; and upon the three other defendants, Sarah Jane White, William F. White and Willard L. White, minors, by reading the same to them, and also by giving a copy in hand to their father, with whom said three minors resided.

The solicitor for the complainants now presented to the judges an order in writing prepared to be passed at Chambers, appointing the said Francis B. Crane, as guardian *ad litem* of said Hannah P. Lothrop, and appointing the father of said three other defendants, minors, their guardian *ad litem*; and referred to the authorities collected in the first volume of Hare and Wallace's Leading Cases, page 265, to show that the courts of law and equity do not rely upon a probate guardian; but that whenever minors are defendants, the courts cause them to defend by a guardian *ad litem* of their own appointment.

But SHAW C. J. said that the rule in this commonwealth at least was otherwise; that our courts did not appoint a guardian *ad litem* for a minor defendant who had a probate guardian; that a court appointing a guardian *ad litem* had no power to require him to give bond; that a probate guardian, who did not faithfully conduct the defence of his ward, would be liable upon his probate bond, and therefore that a guardian *ad litem* appointed by the court would not be so safe for the minor as a probate guardian; and all the four associate judges, after conference, concurred. And the chief justice, after erasing so much of the order as had been prepared for appointing a guardian *ad litem* for Hannah P. Lothrop, signed the order, so that a guardian *ad litem* was appointed for Sarah Jane White, William F. White and Willard L. White, but not for Hannah P. Lothrop.

The cause came on to be heard at the Law Term at Dedham in October, 1851, upon the bill taken for confessed as to Ansel P. Curtis, and upon answer of the other defendant, who was of full age, and of the said Hannah P. Lothrop, by her probate guardian, and of the said three other minor defendants by their guardian *ad litem*. The case and pleadings were printed, and the print expressly and distinctly showed that the answer of said Hannah P. Lothrop was by her probate guardian, and that no guardian *ad litem* was appointed for her. The case was submitted upon a printed argument for the complainants, no counsel appearing for the defendants. The case was continued *nisi* for advisement, and afterwards, in June, 1852, a rescript came in, entering a decree as of the February Term, Norfolk, 1852, declaring "that the word 'principal,' in the devise of the said Thomas Curtis, the father, set out in the bill wherein the will directs that 'then the said trustees may dispose of

so much of the principal as may be necessary,' means and intends real estate; and that under the circumstances set out in the pleadings, it is the duty of the complainants, the trustees, to sell and convey in fee simple from time to time so much of the said real estate described in the third account of the trustees," &c., "as they, said trustees, shall find necessary for providing the means requisite for the comfortable support of the *cestui que trust*, Thomas Curtis, during his natural life," &c.

ELLIS AMES,
Solicitor for Complainants.

RECENT ENGLISH CASES.

Court of Crown Cases Reserved.

REGINA *v.* EDWARD GIBBONS. [Jan. 18, '62.

Coram.—COCKBURN C. J., ERLE C. J., POLLOCK C. B., WIGHTMAN, WILLIAMS, CROMPTON, WILLES, KEATING, and MELLOR JJ., MARTIN, BRAMWELL, CHANNELL, and WILDE BB.

Perjury — Materiality as affecting credit — Question in cause — Inadmissible evidence.

Upon an application for an affiliation order against one H., the mother, who had been delivered in March, was asked in cross-examination whether she had not had connection with the prisoner in the previous September. She denied that she had. The prisoner having been afterwards called for, H., to contradict her, swore falsely that he had had connection with her in the month named. Upon indictment and conviction for perjury for thus falsely swearing—

Held (Crompton J., and Martin B., *dissentientibus*), that the conviction was right; that, although the question put to the principal witness was not relevant to the issue as to the paternity of the child (for it was assumed the prisoner could not have been the father), it was relevant to that witness's credit; and that, although the prisoner's contradictory evidence was properly inadmissible, having been admitted it was relevant to the inquiry as affecting the credit of the principal witness, and was the subject of perjury.

Case reserved by WILLIAMS J.:—"In this case the defendant was tried before me at the last assizes for the county of Sussex for perjury, in having falsely sworn that, in September, 1860, he had carnal knowledge of the person of Ann Bishop. She was delivered of a bastard child on March 29,

1861. On the 28th of June following, an application made by her for an order of affiliation on one Harmer came on to be heard before the magistrates, and she made a deposition in support of such application. She was then cross-examined on the part of Harmer as to whether she had not had connection with the defendant in the previous September. She denied it. The defendant was afterwards called as a witness on behalf of Harmer, and swore that he had had connection with her as imputed by the question put to her. On the trial before me, at the close of the case for the prosecution, it was objected by Mr. Addison, the counsel for the defendant, that the evidence given by the defendant on which the perjury was assigned, was not material to the issue raised on the application for the affiliation order, inasmuch as the question put to Ann Bishop as to having had connection with the defendant went merely to her credit; and therefore her answer ought to have been regarded as conclusive, and the evidence of the defendant in contradiction of her was inadmissible and illegal, and not material to the question raised before the magistrates. The defendant was convicted, but I reserved the point for the consideration of this court whether the objection made in his behalf was well founded."

Addison, for the prisoner. [MARTIN B. — Are we to assume that the prisoner could not have been the father of the child?] [WILLIAMS J. — That is to be assumed.] The child must have been begotten in the previous June, and therefore the connection in September was immaterial to the issue as to the paternity. But perjury cannot be assigned upon a matter not material to the inquiry. *Manton's case*, cited Palmer 383, where the sanity of a testator at the time of death was the question, and his condition five days previous was held immaterial: *Custodes* v. *Gwinn*, Styles 336; *Custodes* v. *Toos*, *ibid.* 374; *Reg.* v. *Griepe*, 12 Mod. 139, 1 L. Raym. 148; *Reg.* v. *Dunstan*, Ry. & Mo. 109; *Reg.* v. *Bartholomew*, 1 C. & K. 366; *Reg.* v. *Murray*, 1 F. & F. 80. Here the question is upon a collateral matter. [COCKBURN C. J. — I take it that any question that goes to a witness's credit is material.] That may be so, and if the woman had sworn falsely she probably might have been indicted; but, as the question put to her was one affecting her credit only, and not the issue in the case, her answer ought to have been conclusive. [COCKBURN C. J. — Assuming that the question put to the woman affected her credit, the

magistrate ought to have received her answer as conclusive. The question put to the prisoner to contradict her might have been objected to; but it was not. It comes to this:—Evidence which was properly inadmissible has been admitted, and having been admitted it becomes material to the inquiry as affecting the credit of the principal witness.] [CROMPTON J.—No doubt the question put to the woman went to her credit, and was therefore material; but when the prisoner was asked a question which never ought to have been put, I doubt whether his answer is material.] "If the oath for which a man is indicted of perjury be wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is merely idle and insignificant," 2 Hawk. P. C. B. 1, c. 69, s. 8, p. 89, citing 3d Inst. 164. The generality of the marginal note in *Overton's case*, 2 Mood. 265, is not borne out by the facts. In *Reg.* v. *Philpotts*, 21 L. J. M. C. 18, the defendant swore falsely that he had examined an entry on a copy of a will, and the false swearing was with the view to procure the admission of the document in evidence, as evidence of the probate of the will. The document was withdrawn. It was held that as the probate would have been material evidence, although the document was not legally admissible in proof of it, the false evidence was sufficiently material to render the witness indictable for the perjury. [WILDE B.—There the document was never read.] *Reg.* v *Lavey*, 3 C. & K. 26; *Reg.* v. *Martin*, 6 C. & P. 562. [WILLIAMS J.—I have a difficulty in seeing in what way the rape cases apply.]

Barrow, contra.—The evidence of the prisoner, though inadmissible when admitted, became material. The oath was not, according to the test given in the passage cited from 2 Hawk. B. 1, *supra*, "altogether immaterial," "idle and insignificant." Holt C. J., in *Griepe's case*, 1 L. Raym. 258, says it is not necessary that the degree of materiality should appear in the information, for if the matter be but circumstantially material, it is perjury. In 3 Inst. 167, the test is that the matter must concern the point in the suit; and the oath of the defendant here did concern that, as it affected the credit of the woman. *Overton's case*, *sup.*, shows that if she had sworn falsely she could have been indicted;

Reg. v. *Lavey*, *sup.*, *Reg.* v. *Murray*, *sup.* The authorities differ as to whether questions respecting the motives, interest, or conduct of a witness, as connected with the cause, are irrelevant and are collected; "2 Taylor on Ev." 1st ed. 967. Supposing, however, that the evidence of the prisoner here was rightly or wrongly admitted, perjury might be assigned on it. *Reg.* v. *Berry*, 28 L. J. M. C. 86, 7 W. R. 229, shows that a proceeding in bastardy is a civil suit, and that an irregularity in it may be waived. *Reg.* v. *Meek*, 9 C. & P. 513; *Reg.* v. *Philpott*, *sup.*.

Addison, in reply, cited *Reg.* v. *Muscot*, 10 Mod. 195.

COCKBURN C. J.—I have to deliver the opinion of all the learned judges, with the exception of my brothers Crompton and Martin, in addition to my own—that this conviction is right. I take it that the question put to the principal witness was a pertinent one, which she was bound to answer. It is true that it had no direct reference to the main issue—the paternity of the child—but it had an indirect reference to the main issue. Its importance was to show how far the woman was worthy of credit; and that she was bound to answer it as being relevant to her credit, I have no doubt. No doubt if she had answered falsely she would have been liable to be indicted for perjury. But being a question relevant only to the credit of that witness, all parties ought to have been bound by her answer. The magistrate, however, admitted evidence to contradict her, which was, in fact, in point of technical strictness, inadmissible, but which, when admitted, was relevant to the inquiry as affecting her credit. The evidence having been so admitted was then pertinent to the matter in question, and came within the rule laid down in the passage cited from Hawkins. It had reference to the inquiry, and tended to mislead. As, therefore, this piece of evidence, though in strictness inadmissible, having been admitted, was relevant to the inquiry as affecting the credit of the principal witness, and tended to induce the court to come to a wrong conclusion, *Reg.* v. *Philpotts* is an authority that perjury may be assigned upon it; and I agree entirely with the principle laid down in that case. The evidence of the prisoner might have had a most serious effect upon the minds of the magistrates who were to decide the case; and, upon the principle laid down in *Reg.* v. *Philpotts*, we are of opinion that the conviction was right.

CROMPTON J.—I am not satisfied that this conviction is right. The old doctrine can hardly be impugned that in order to assign perjury the matter must be material in the cause. In the old forms it was necessary to show how the matter was material; and it would have been necessary to aver that it became material, to inquire whether on a particular day stated the prisoner had had carnal knowledge of the woman. But it is admitted that the question could only be put to the woman as affecting her credit, and in that case you are bound to take her answer as conclusive. It was put in the same way as she might have been asked if she had been guilty of stealing. I take it that as soon as she answered the question in the negative it was conclusively settled that the connection had not taken place as much as if it was then a matter of record. It seems to me that whether the connection had or had not taken place was then no longer a question in the cause. By the law of the land, it was then to be assumed that the connection had not taken place, and evidence in contradiction of that was inadmissible. If the evidence had been merely a step in the cause, such as evidence tendered for the purpose of getting in evidence of a document or the like, the case might be otherwise, as being a step in the cause, it would be material. Here I do not see that the matter sworn to by the defendant was a material question, or, indeed, any question at all in the cause. The rape cases, in which the woman has denied her connection with men, and evidence to contradict her has been allowed, are distinguishable upon the ground that in those cases the questions do not go solely to the credit of the prosecutrix, but are also material to the issue as to whether the woman has or has not consented. I have thought it right to express my opinion, as I am unable to agree with the reasoning of the majority of the court.

MARTIN B.—I am of the same opinion, and the test which I apply is this:—Assuming the facts to have been set out on record, would the connection with the defendant, alleged by him to have taken place, have been material to the issue—the paternity of the child? If it would not be so, the question was inadmissible and immaterial; and I think that a blunder of the justices in allowing what was not evidence to be put in evidence cannot make it material. It would lead to much inconvenience in the administration of the criminal law if a question of perjury or no perjury should be allowed to depend

upon what justices at petty sessions may or may not receive in evidence.

Conviction affirmed.

Perjury may be committed by wilfully false swearing in a point which is only circumstantially material to the question in dispute. *Commonwealth* v. *Pollard*, 12 Met. 225. In Hawkins's Pleas of the Crown, is the following qualification to the general rule:—"Also it seemeth that any false oath is punishable as perjury, which tends to mislead the court in any of their proceedings relating to a matter judicially before them, though it in no way affect the principal judgment which is to be given in the cause." 1 Hawk. P. C. bk. 1, c. 69, s. 3. And in *Regina* v. *Philpotts*, 2 Denison 302, where the defendant by means of a false oath endeavored to have a document received in evidence, MAULE J. said, "It is, therefore, a false oath in a judicial proceeding; it is material to that judicial proceeding, and it is not necessary that it should have been relevant and material to the issue being tried."

In *Regina* v. *Overton*, 2 Moody, 266, LORD DENMAN C. J. said, "Everything is material which affects the credit of a witness. Every question on cross-examination that goes to the credit of a witness is material." But where a prisoner charged with robbery before a magistrate, having cross-examined the prosecutor whether he had not, the day before that of the alleged robbery, met him (the prisoner) in company with M., and proposed to him to commit a burglary, and the prosecutor having denied this, the prisoner called M. to prove it, it was held that M.'s evidence was not material to the issue, so that it could be made the subject of an indictment for perjury. *Regina* v. *Murray*, 1 F. & F. 80, MARTIN B., after consulting BYLES J. See *Regina* v. *Lavey*, 3 C. & K. 26.

Court of Exchequer.

BUTLER *v.* HUNTER. [Jan. 13, '62.

Negligence — Contractor — Pulling down houses — Liability of employer.

Where a person employs a builder to take down his house, the builder and not the employer is liable for the consequences of a neglect of any ordinary precaution, such as shoring, scaffolding, or the like.

The first count stated that the plaintiff and defendant were possessed of adjoining houses, and that the defendant so carelessly pulled down part of his house, that the plaintiff's was thereby injured. Second count, that the plaintiff was the owner of a house adjoining the defendant's, and was entitled to its support, but that the defendant carelessly pulled down part of his, neglecting to shore up the plaintiff's, whereby it was injured.

Pleas, denying the negligence, and also the right of support thus claimed.

The defendant was the owner of a house standing next door to the plaintiff's; a fire occurred in defendant's house,

and repairs became necessary. Defendant employed one Reading, an architect, who surveyed the premises, and informed defendant what was necessary to be done. Defendant employed one Johnson, a builder, and told him first to estimate the cost of doing "what was necessary." The estimate was £45, and then Johnson was directed to do the work. Reading directed the works; in the course of the repairs, a bresumer belonging to defendant's house, and which projected six inches into plaintiff's party wall, was taken out. Plaintiff's wall came down, and thereupon he brought this action. Upon these facts Martin B., at the trial, nonsuited the plaintiff, with leave to move.

Denman, *Q.C.*, accordingly obtained a rule to show cause why a new trial should not be had on the ground that there was evidence to go to the jury of defendant's liability.

Huddleston, *Q.C.*, and *Thompson Chitty*, now showed cause, and contended that where a person employs a contractor to do works, he is not liable for negligence unless he interferes personally. They relied on *Hole* v. *The Sittingbourne and Sheerness Railway Co.*, 6 H. & N. 488; 9 W. R. 274; and *Reedie* v. *The London and North-Western Railway Co.*, 4 Exch. 244. [MARTIN B.—You must establish the relation of master and servant before you can make any person, but the man whose hand actually did the work, liable.]

Denman, *Q.C.*, and *H. James*, in support of the rule, quoted *Steel* v. *The South-Eastern Railway Co.*, 16 C. B. 550; and relied upon the judgment of Cresswell J. in that case. The relation of master and servant existed between the workman and defendant, for defendant must have known the bresumer must be taken away, and he gave directions that the necessary work should be done. [MARTIN B.—The workman was the servant of the contractor, he could not be the servant of both.] They also referred to *Burgess* v. *Gray*, 1 C. B. 578. There was here no contract beyond a mere employment. [MARTIN B.—To do "all that was necessary."] The rule as laid down in Addison, on "Torts," p. 257, is that the employer is liable for the natural result of his own orders. [WILDE B.—Surely he is not liable for the builder's neglect of ordinary and usual precautions?] [MARTIN B.—It must be taken that he meant the work to be done in the ordinary and proper way.] The effect of the directions given by him was for the jury. [MARTIN B.—There was no evidence of any personal interference on his

part.] The original directions came from him, and the *effect* of them was for the jury. [WILDE B.—The builder is liable for the neglect of any ordinary precaution. He is skilled in such work, the employer is *not* so. It would be unreasonable to make the employer liable in such a case. What distinction is there between shoring and scaffolding?] The defendant was not shown to have directed any precautions to be taken.

The COURT (POLLOCK C. B., MARTIN B., and WILDE B.,) were clearly of opinion that the defendant was not liable. The argument for the plaintiff came to this, that when a person ordered any work which might require precautions to be taken, he was bound to show that he had expressly directed specific precautions to be taken, and that it is for the jury to say whether he has done enough to liberate himself from liability. In this case there was no evidence beyond the fact that the defendant employed a builder to do all that was necessary to be done under the circumstances. And we all think that this must be assumed to have meant that the builder was to do the work in the ordinary way, and with all usual and proper precautions. That is matter of law, and there is no evidence here of any negligence on the part of the defendant. No doubt where the thing done was in itself a nuisance, the employer might be liable; but not so where the injury arose, as here, from the improper manner in which the thing was done. The taking out of the bresumer might have been safely done, had the plaintiff's house been shored. And what distinction can there be between neglect of shoring and insufficient scaffolding, or any other ordinary and necessary precaution in builder's work? It would be unreasonable to require the employer, an unskilled person, to point out to the builder, a skilled person, what are the proper means for doing his work. It is matter of law, that when a person gives an order to a skilled person to do any work, he must be taken to mean it is to be done in the usual way, and with all necessary and ordinary precautions. Here the defendant did no more, in effect, than give such an order. Therefore,

Rule discharged.

The general rule is, that he who does the injury must respond. The well-known exception is, that the master shall be responsible for the doings of the servant whom he selects, and through whom, in legal contemplation, he acts. But when the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and

control of the employer, the relation of master and servant does not exist and the liability of a master for his servant does not attach. The distinction upon which the cases turns is, whether the relation of master and servant exists, or that of contractor and contractee. The law upon this subject has been recently considered, and the cases fully reviewed, by THOMAS J., in the recent case of *Hilliard* v. *Richardson*, 3 Gray, 349 (1855). In this case it was decided, that the owner of land, who employs a carpenter, for a specific price, to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair. And on the same principle, it was held in *Linton* v. *Smith*, 8 Gray, 147 (1857), that the owners of a vessel are not liable for damages occasioned by the negligence of stevedores employed for a gross sum by the consignees of the charterers in unloading the cargo.

Court of Common Pleas.

FELTHOUSE *v.* BINDLEY.

Contract — Acceptance of proposal — Statute of frauds — Relation back.

The plaintiff and his nephew were negotiating for the sale of the nephew's horse to the plaintiff. No bargain was at first made, but the plaintiff subsequently wrote to his nephew offering a certain sum of money for the animal, and stating that unless he heard from his nephew, he should consider the horse as his (the plaintiff's). Some time after, and before any answer to this letter, the nephew sold by auction some of his effects, but did not then mean to sell the horse at the sale, intending to accept his uncle's offer for it. The auctioneer (the defendant), however, by mistake sold the horse. The nephew, two days after the sale, wrote to the plaintiff that he had intended to accept his offer, and did so then as far as he could.

Held, in an action of trover by the plaintiff against the auctioneer for a conversion in selling the horse, that there was no sufficient acceptance by the nephew of the plaintiff's proposal until after the alleged conversion, and that the subsequent acceptance did not relate back so as to pass the property in the horse to the plaintiff before the sale at auction.

Trover for a horse.

Pleas.—1. Not guilty. 2. Not possessed.

In the month of January, 1861, the plaintiff's nephew was possessed of the horse in question. In that month he had a communication from his uncle, the plaintiff, signifying his desire to purchase the horse. No bargain was made in the first instance. The nephew, however, was under the impression that the plaintiff had agreed to purchase it for £31 10*s*., and the uncle was under the impression that he had agreed to purchase it for £30. On the 2d of January the plaintiff wrote to his nephew to the effect that he was

willing to split the difference, and to give £30 15*s.*, and that unless he heard from his nephew he should consider the horse as his (the plaintiff's).

On the 25th of February the nephew sold by auction some of his effects, but did not then intend to sell the horse, having made up his mind to accept his uncle's offer. The auctioneer, the now defendant, however, forgetting his instructions, sold the horse on that day for £33.

On the 27th of February the nephew wrote to the plaintiff to the effect that he had intended to accept his offer, and did so then as far as he could. This letter was objected to as inadmissible, having been written after the alleged conversion, but it was received in evidence. It was also objected that there was no note in writing relative to any sale from the nephew to the plaintiff, to satisfy the Statute of Frauds.

A verdict was found for the plaintiff for £33, leave being reserved to move to set it aside and enter one for the defendant on the second issue.

A rule having been obtained,

J. J. Powell showed cause. — There was sufficient title shown at the trial to enable the plaintiff to maintain this action. There is a sufficient note in writing. If I have evidence that the plaintiff's nephew did assent to the plaintiff's proposition, I may say that there is a valid contract. It is contended on the other side, that the letter of the 27th of February is not admissible, because it was after the conversion. He cited *Dobell* v. *Hutchinson*, 3 A. & E. 355; *Smith* v. *Neall*, 2 C. B. N. S. 67, 5 W. R. 563; and *Bill* v. *Bament*, 9 M. & W. 36.

M. Smith, *Q.C.*, and *Dowdeswell*, in support of the rule.— This letter was not admissible. If the letter was necessary to perfect the contract, then it is clear that the contract was incomplete on the 25th if it wants that letter. [WILLES J. —Could the plaintiff have insured the horse on the 25th?] I apprehend not. [WILLES J. referred to the case of *Stockdale* v. *Dunlop*, 6 M. & W. 224.]

WILLES J. — I am of opinion that this rule must be made absolute to enter a nonsuit. It is clear that there was no agreement on the 2d of January. It is also clear that the uncle could not put upon the nephew that he should consider the offer accepted if he did not write. Matters remained so until the 25th of February, when the nephew was desirous of selling some of his effects, but not the horse. It is clear,

therefore, that he intended to accept his uncle's offer, but had not bound himself by communicating his intention to his uncle. Upon the 25th the horse was sold by the defendant, and it is of that that the plaintiff complains. It appears to me that he has no right to do so. The letter of the plaintiff's nephew of the 27th says that he intended to accept, and did then accept as far as he could, the offer of his uncle. It appears to me that the first binding acceptance of the offer of the 2d of January was on the 27th of February, and if that be so, the plaintiff cannot recover. It seems to me that it would overrule the case of *Stockdale* v. *Dunlop*, in the 6th M. & W., to hold that a subsequent assent could so relate back.

BYLES J. — I am of the same opinion.

KEATING J. — I concur in the opinion expressed by my brother Willes. Had the question been between the uncle and nephew, there would probably have been a difficulty. The question is whether the horse which was sold on the 25th of February was the horse of the plaintiff. Now it seems to me that there was nothing, then, which had passed it out of the nephew into the uncle.

WILLES J. — I ought also to mention the case of *Coats* v. *Chaplin*, 3 Q. B. 483, which shows how the nephew has his remedy.

Rule absolute.

BINCKES *v.* PASH.

Lights — Easement — Encroachment — Obstruction.

The plaintiff's building consisted of a ground-floor and first-floor. On the ground-floor were five ancient windows. On the first-floor were five windows, four of which had been increased in size about ten years ago, and the fifth had been substituted for what was formerly a wooden door.

The defendant, whose land was at a distance of ten feet from the plaintiff's building, built, subsequently to the alterations in the upper windows, a workshop on the edge of his land, which obstructed the light before coming to the plaintiff's lower or ancient windows, but not the light coming to the upper ones. The defendant, however, did so without any intention of obstructing any of the plaintiff's windows.

Held, by *Erle C. J.* and *Williams J.*, that by increasing the size of the upper windows, the plaintiff did not forfeit his right to the light coming to the lower windows.

Held, also, that the right to build so as to obstruct a new window, and in so doing, if necessary, obstructing an old window, is only matter of justification for what would otherwise be a wrong; and it is essential for the support of that justification to show that the obstruction was raised for the purpose of obstructing the new window, and in effecting that purpose unavoidably obstructed the ancient window also.

Held, per *Byles J.*, that the plaintiff's ancient unaltered window had not lost its right, except on a contingency which had not yet happened; that the easement belonging to that window is liable to be suspended, or, in course of time, destroyed, when the servient owner necessarily blocks it, in order to prevent a servitude in favor of other and new lights which cannot possibly be blocked without blocking the ancient light also; that here the servient owner had not yet done this, and was liable for blocking up the old light.

Held, per *Keating J.*, that a person who has acquired a right to the enjoyment of light by user, may so alter the mode of such enjoyment by a change in the windows admitting the light in their size, shape, or number, and with or without an alteration in the character of the building in which they are placed, as to lose the right previously acquired; yet that it is difficult to define the precise amount of alteration which will have that effect; that if the jury had found in the present case that the alteration in the plaintiff's upper windows was material, and that the unprivileged light could not be obstructed without also obstructing that which otherwise would be privileged, then the plaintiff would have lost his right to complain of the obstruction in question.

Declaration for the obstruction of the plaintiff's ancient lights.

Pleas. — Not guilty; and a denial of the plaintiff's right to the light claimed.

The cause was tried before Erle C. J., at the London sittings after Hilary Term, 1861.

The plaintiff was a piano-forte maker in Cornbury place, Old Kent-road, in Surrey. The defendant, who was a boot and shoe manufacturer, lived next door. The defendant also had another house (on the other side of the plaintiff's), let to one Harris. Prior to August, 1860, an open space existed between the house let to Harris and the premises of the defendant. In August, 1861, the defendant began building a workshop behind Harris's premises. The plaintiff objected to this, and applied to the Court of Chancery for an injunction to restrain the defendant from obstructing the plaintiff's lights, and also filed his bill. The motion stood over till the hearing, and the building in the meantime was not to be raised any higher. Afterwards an order was made by Kindersley V. C. that the plaintiff should be at liberty to try the question at law.

This action was accordingly brought. The main question at the trial was, whether the lights of the plaintiff were or were not obstructed in the manner complained of. The plaintiff's manufactory was a long building of two floors, the ground-floor being used as a manufactory, and the first-floor as a show-room. On the ground-floor were five ancient

windows. In the upper-floor were also five windows, four of which had been enlarged on one side and at top, about ten years before the present dispute, at which time, also, the fifth window was made, being substituted for a wooden door. There was a space of ten feet wide between the plaintiff's and defendant's premises, which belonged to the plaintiff.

Upon the issue on the plea of not guilty, a verdict was found for the plaintiff. On the other issue, a verdict was entered for the plaintiff, leave being reserved to move to set it aside and enter one for the defendant, if the court should be of opinion upon these facts, and upon an inspection of a model, that the plaintiff was not entitled to the right contended for.

A rule having been obtained,

Bovill Q. C. and *C. E. Pollock* showed cause:—*Chandler* v. *Thompson*, 3 Camp. 80; *Blanshard* v. *Bridges*, 4 A. & E. 176; *Renshaw* v. *Bean*, 18 Q. B. 112; *Hutchinson* v. *Copestake*, 9 C. B. N. S. 863; *Luttrell's case*, 4 Rep. 86 a.; *Aldred's case*, 9 Rep. 55 b.; *Yard* v. *Ford*, 2 Wms. Saund. 172; *Thomas* v. *Thomas*, 2 C. M. & R. 34.

Parry Serjt., *T. Jones*, and *W. W. Cooper* (of the Chancery bar), in support of the rule:—*Garritt* v. *Sharp*, 3 A. & E. 425; *Cawkwell* v. *Russell*, 26 J. L. Ex. 34; *Turner* v. *Spooner*, 30 L. J. Chan. 801.

Cur adv. vult.

Jan. 31. — KEATING J. — This was an action for obstructing the plaintiff's lights. The pleas were — Not guilty, and a denial of the plaintiff's right to the lights. The building of the plaintiff was two stories high, with a range of windows in each story; those on the ground-floor were ancient unaltered windows; those on the second-floor had, about ten years before, been altered, not in number, but in size, by adding, as the plaintiff alleged, a very small additional space or strip on two sides of each window. The defendant built a shop on the opposite side of a passage, ten feet wide, which, as he contended, did not affect the light passing to any of the plaintiff's windows; and this was the point contended at the trial. The jury found for the plaintiff, on the plea of "not guilty," but found nothing on the second issue, except that the model was correct. The verdict was entered for the plaintiff upon that issue, and the question is, whether we can, without any other finding by the jury, set aside that verdict, and enter it for the defendant, on the ground that the right of the plaintiff

to the enjoyment of light through all his windows was suspended or lost by his alteration of those in the second story. Assuming it to be established by the authorities (as in my opinion it is), that a person who has acquired a right to the enjoyment of light by user, may so alter the mode of such enjoyment by a change in the windows admitting the light in their size, shape, or number, and with or without an alteration in the character of the building in which they are placed, as to lose the right previously acquired; yet it is difficult to define the precise amount of alteration which will have that effect. It would be scarcely reasonable that a trifling alteration in the mode of enjoyment, whereby no injury is done to the servient tenement, should forfeit the whole right: *Hall* v. *Swift*, 4 Bing. N. C. 381; whilst, on the other hand, such a material alteration as that in *Garritt* v. *Sharp*, or in *Jones* v. *Tapling* (not yet reported), would, in my opinion, forfeit the right as being a total violation of the conditions upon which alone that right rested. If, therefore, the jury had found in this case, that the alteration in the upper windows of the plaintiff's building was material, and that the unprivileged light could not be obstructed without also obstructing that which otherwise would be privileged, then I should be of opinion, upon the authority of *Renshaw* v. *Bean*, and the other authorities I have referred to in *Jones* v. *Tapling*, that the plaintiff had lost his right to complain of the obstruction in question, and that our judgment should be for the defendant. But I am unable to say, merely looking at the model, that such is the case. There was, as I understand, no evidence given upon that point at the trial, the defendant resting his case entirely upon the fact of non-obstruction; and, it may be, if that question had been contested before the jury, they would have found the addition to the windows to be so small, as not to vary in any essential degree the mode of enjoyment; at all events, the leave extended only to an inspection of the model. I am not satisfied by such inspection that the state of things clearly existed that would, upon the authorities referred to, cause a forfeiture of the plaintiff's right. I agree, therefore, that the rule to enter a verdict for the defendant upon the traverse of the right should be discharged.

Byles J.—I am of opinion that the plaintiff is entitled to the judgment of the court. I think that the plaintiff's ancient unaltered window has not lost its right, except on a contingency which has not yet happened. The easement belonging

to that window is, no doubt, liable to be suspended, or, in course of time, destroyed; when the servient owner necessarily blocks it, in order to prevent a servitude in favor of other and new lights, which cannot possibly be blocked without blocking the ancient light also. The servient owner has not yet done this. He has not only not yet proceeded to raise his new building to such a height as to block the new lights, but, on the contrary, he has roofed and finished his new building without doing so, and perhaps he never will do so. It is said that the servient owner has done no more than he has a right to do, because he might have legally done even more than he has done. The mode of answering this objection is, I conceive, to distinguish between the absolute right to block the ancient windows and the conditional rights dependent on another enterprise, which has not yet been undertaken by the defendant, and, perhaps, never will be. Not to observe this distinction would be to sacrifice the ancient right of the dominant owner, where the only reason for the sacrifice has not yet come into existence, and, peradventure, never may.

Williams J. — In this case I am of opinion that the plaintiff is entitled to our judgment. The real question in this case appears to me to be whether, if the owner of the dominant tenement has exceeded the limits of the right he has acquired to the access of light and air by opening an additional window, leaving his ancient windows unaltered, he has lost or suspended his admitted right, or whether the opening of the additional window merely justifies the owner of the servient tenement in obstructing the ancient windows, if the doing so is unavoidable in the exercise of his right to obstruct the new windows. If the former is the right view, I think the defendant is entitled to our judgment; because the right has ceased to exist on which the action is founded. If the latter, then the plaintiff is entitled to maintain his action, because the defendant has not chosen to exercise his right of obstructing the new windows, and has therefore never been under the necessity of obstructing the ancient windows in the exercise of that right. On the part of the defendant, it was argued that this point was expressly decided in the case of *Renshaw* v. *Bean*, and that, as a court of co-ordinate jurisdiction, we are bound by that decision. But I think the present case distinguishable, on the ground that in *Renshaw* v. *Bean* the windows, the right to which was held to be suspended, if not lost, had been so

much altered that they could not properly be regarded as the same windows as those in respect of which the right had been gained; so that, in truth, the ancient windows, and the right claimed in respect of them, might well be regarded as having ceased to exist. But in the present case, the privileged windows remain unchanged, and the right acquired in respect of them must also remain, unless it has been in some legal way forfeited, or lost, or suspended. I beg to adopt the reasoning of my lord in his judgment in *Jones* v. *Tapling*, as affording, in my opinion, unanswerable grounds for contending that there has been no such forfeiture, or loss, or suspension.

Erle C. J. — In this case the declaration was for an obstruction of light. The pleas were — first, not guilty; and secondly, a denial of the right to the light. At the trial the contest was whether the buildings of the defendant did obstruct to such a degree as would sustain the action; and upon the plea raising that question, the verdict was for the plaintiff, and that verdict is to stand. On the second plea, denying the plaintiff's right to the light, the verdict was entered for the plaintiff, with liberty to the defendant to move to reverse it, if, upon the undisputed facts, and upon inspection of the model of the premises produced, the court should be of opinion that the right was disproved. It appeared that the windows of the ground floor had existed in their present state more than twenty years before action brought, and the jury found that those windows were obstructed by a building of the defendant erected at the distance of ten feet therefrom. It further appeared that the plaintiff had, about ten years before the action, so altered and enlarged the windows of the upper floor as that an obstruction of the new parts of those windows would have been lawful; and I see from the model, that, at the distance of ten feet, no obstruction of the new part could have been effectual which did not also obstruct both the old parts of the same windows and also the windows of the ground-floor which are found to have been obstructed, and that a structure effectual to obstruct the unprivileged parts of the upper windows must, according to the laws of nature, have obstructed the lower windows to a greater extent than the building complained of. It further appeared that the defendant's building did not obstruct any part of the upper windows, though the shade of it reached them for a short time during some days in the year, and that the defen-

dant had not the remotest intention of exercising any right of obstruction in erecting his building; on the contrary, he maintained that it neither did nor could obstruct any window at all. These are the material facts upon which the question is raised, whether the right of the plaintiff to the light of the lower windows is disproved. We take it to be clear from the cases of *Blanshard* v. *Bridges*, *Renshaw* v. *Bean*, and *Hutchinson* v. *Copestake*, that the right of the plaintiff, in respect of his privileged windows, was not suspended by reason of his taking light through the apertures in part unprivileged, and thereby attempting to increase the servitude to which the defendant's premises were subject. The plea, denying the right of the plaintiff, was held to be proved in *Renshaw* v. *Bean*; and the defendant contended that the defence in that case did not rest upon an excuse for an act of the defendant *primâ facie* unlawful, but upon a loss of right by the plaintiff in consequence of the encroachment attempted by him. If so, it would follow that, if a wall of a certain height is necessary to obstruct a new window, and if, in the course of erection, before it is sufficiently high for the new window, it obstructs an old window, the servient tenement would have a defence against an action for that obstruction, not on the ground that he was obstructing the new window, and so was justified in respect of the old window, which he could not conveniently avoid obstructing, but because the plaintiff's right would be gone for the time. The attempt at encroachment of the dominant tenant, according to the cases above cited, would, if this be correct, restore to the servient tenant dominion over his tenement free from servitude to the extent reasonably necessary for obstructing the encroachment. In the present case, the structure complained of might be enlarged, and might so become a part of an entire structure, lawful, because it obstructed an encroachment, and in so doing, necessarily obstructed a lawful easement. Then does it become a wrong and a cause of action, because it was done for another purpose, in the belief that, at the distance of ten feet, it could not operate as an obstruction at all, and in its present state does not obstruct the upper windows at all? This the defendant would answer in the negative, because, if the plaintiff's encroachment operates to effect a loss of right in him, and a restoration of right to the defendant, whatever the defendant does within the limit of the right so restored to him is justified thereby, although he may have been ignorant

of his right, and had no intention of exercising it. But, in my opinion, this argument of the defendant is not entitled to succeed. The whole of it rests on the assumption that the plaintiff's right to the easement for the privileged windows is lost by reason of the opening of the unprivileged windows, which assumption is founded on the judgment in *Renshaw* v. *Bean*, that the verdict should be entered for the defendant, on the plea denying the plaintiff's right to the light. That case may be distinguished from this, on the ground pointed out by my brother Williams, namely, that there, no ancient window was left in its original state. Every window had been altered; and if the alteration rendered it impossible to separate the privileged part from the unprivileged, the right must be suspended or lost. But where an ancient window continues in its original state, the opening of a new window does not directly affect the right to the ancient window; a case might be put where each story in the same house belonged to a separate owner; and it could not be maintained that an encroachment by a tenant of the upper story destroyed the rights of the tenants of the lower stories to their ancient lights. Also, the doctrine of forfeiting ancient lights by opening new lights, does not seem to me supported by authority, nor by public convenience, as explained by me more fully in *Jones* v. *Tapling*. I therefore come to the conclusion that the right to build so as to obstruct a new window, and, in so doing, if necessary, obstructing an old window, is only matter of justification for what would otherwise be a wrong; and that it is essential for the support of the justification to show that the obstruction was raised for the purpose of obstructing the new window, and, in effecting that purpose, the ancient window was unavoidably obstructed also. The facts of this case do not sustain that justification. It follows, therefore, that the plaintiff is entitled to keep the verdict found for him on the plea denying his right, and that this rule must be discharged.

Rule discharged.

LEGAL NOTES AND ANECDOTES.

The rule excluding hearsay evidence, or rather the mode in which that rule is frequently misunderstood in courts of justice, is amusingly caricatured by Mr. Dickens in his report of the case of *Bardell* v. *Pickwick*, p. 367 :—

"I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up, if you please, Mr. Weller."

"I mean to speak up, sir," replied Sam. "I am in the service o' that 'ere gen'l'man, and wery good service it is."

"Little to do, and plenty to get, I suppose?" said Sergeant Buzfuz, with jocularity.

"Oh quite enough to get, sir, as the soldier said ven they ordered 'im three 'undred and fifty lashes," replied Sam.

"You *must not tell us what the soldier*, or any other man, *said*, sir," interposed the judge; "*it's not evidence.*"

"Wery good, my Lord," replied Sam.

In deciding upon the validity or invalidity of deeds, courts of equity act upon more enlightened principles than courts of law; and whenever it is shown to them that any person by donation derives a benefit under a deed to the prejudice of another person,—and the more especially so, if any confidential or fiduciary relation subsists between the parties,—they so far presume against the validity of the instrument, as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence, or unconscionable advantage. For example, if a deed of gift, or other disposition of property be made in favor of a husband by a wife, a court of equity will regard the matter with jealous suspicion, and will either set aside the instrument as conclusively void, or will throw upon the person benefited the burthen of establishing, beyond all reasonable doubt, the perfect fairness and honesty of the entire transaction.[1] A grotesque attempt has

[1] Taylor Ev. 3d ed. 146, 147.

recently been made in Ireland to extend this salutary doctrine to a case, which assuredly its framers never contemplated. A woman, while living in adultery with a married man, had in the ardor of her affection assigned some of her property to secure a debt which was owing by her paramour. When her passion cooled, her generosity seems to have cooled also; and after the lapse of a short period she had the hardihood to apply to the Court of Chancery to set aside her assignment on the ground of undue influence. Her prayer was of course rejected, the court holding that the doctrine on which she relied for relief was only applicable when some lawful relation had been contracted between the parties.[1]

Something more than the ceremony of marriage was necessary to give the wife a right of dower, by the laws of Normandy. "C'est au coucher que la femme gagne son donaire"—"il faut qu'elle couche avec son mari pour acquérer son donaire c'est ce qui donne la derniere perfection à ce choit."[2]

The following is a celebrated passage from one of Lord Plunkett's speeches, relative to the Statutes of Limitation:—"If time destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the law-giver has placed an hour-glass, by which he metes out incessantly those portions of duration, which render needless the evidence that he has swept away."[3]

In all ranks and conditions of life, persons abound who are too ready to lend an academic faith to a narrative of facts which do not strictly accord with preconceived opinions, mistaken for knowledge; and the errors, to which their habits of distrust expose them, are at times sufficiently ridiculous. So late as the year 1825, the evidence given by the great railway engineer, George Stephenson, before a parliamentary committee, was much impaired by his having ventured an opin-

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[1] *Hargreave* v. *Everard*, 6 Irish Eq. R., N. S., 278.

[2] Flaust, Coutume de Normandie, 528, cited 1 Washburn on Real Property, 169.

[3] See Statesmen of the Time of George III., by Lord Brougham, 3d series, p. 227, note.

ion, that steam-engines might possibly travel on railroads twelve miles an hour.[1]

An exception to the rule rejecting hearsay evidence is allowed in the case of *dying declarations*. Shakespeare, in *King John*, has put the principle[2] on which this species of evidence is admitted, into the mouth of the wounded Melun, who, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis, exclaims:—

> "Have I not hideous death within my view,
> Retaining but a quantity of life;
> Which bleeds away, even as a form of wax
> Resolveth from his figure 'gainst the fire?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false; since it is true
> That I must die here, and live hence by truth?"
>
> [*Act 5, scene 4.*

Evidence of this description is admissible only in the single instance of homicide, "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration."[3] One reason for thus restricting the admission of this species of evidence may be the experienced fact, that implicit reliance cannot in all cases be placed on the declarations of a dying person; for his body may have survived the powers of his mind. Thus, in *King John*, Prince Henry is made to say:—

> "Death's siege is now
> Against the mind, the which he pricks and wounds
> With many legions of strange fantasies;
> Which, in their throng and press to that last hold,
> Confound themselves." [*Act 5, scene 7.*

"The law," said Judge Ashurst, in a charge, "is open to all men, to the poor as well as the rich." And so is the London Tavern.

In England, indictments need not now contain any allegation of *time*, excepting in the very few cases when time is of

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[1] Life of George Stephenson, by Samuel Smiles, ch. 19, 1857.

[2] The general principle is stated by Lord Chief Baron Eyre in *Rex* v. *Woodcock*, 1 Leach, 4th ed. 502 (1789).

[3] *Rex* v. *Mead*, 2 B. & C. 608, and 4 D. & R. 120. *Regina* v. *Hind*, Bell, 253 (1860).

the essence of the offence.[1] In rejecting the old rule which required a day to be specified, but did not require that day to be proved, the legislature adopted my Uncle Toby's reply to the argument used by Corporal Trim, when telling his unfortunate story of the King of Bohemia. "There was a certain King of Bohemia, but in what year of our Lord—" "I would not give a halfpenny to know," said my Uncle Toby. "Only an' please your Honor, it makes a story look the better in the face." "Leave out the date entirely, Trim," said my uncle; "a story passes very well without these niceties, unless one is pretty sure of 'em."

Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak not to facts, but to *opinions;* and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think; but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion. To adopt the language of Lord Campbell, "they come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."[2]

In Saunders's report of the case of *Veale* v. *Warner*,[3] after a statement of his argument for the defendant, he proceeds: "And of such opinion was the whole court clearly. But they would not give judgment for the defendant, because they conceived it was a trick in pleading; but they gave the plaintiff leave to discontinue on payment of costs. And Kelynge Chief Justice reprehended Saunders for pleading so subtlely on purpose to trick the plaintiff by the omission of the other part of the award. But it was a case of the greatest hardship on the defendant; for the bond of submission was only in the penalty of £2000, and the arbitrators had awarded him to pay £3100, being £1100 more than the

[1] 14 & 15 Vict. c. 100, § 24.
[2] Tracy Peer. 10 Cl. & Fin. 191.
[3] 1 Saund. 6th ed. 327, 327 *a*.

real penalty of the bond; when in truth there was nothing at all due to the plaintiff, but he was indebted to the defendant."

In *Birk* v. *Tippetts*,[1] is the following passage: — "And Twysden Justice interrupted Saunders, and said to him, 'What makes you labor so? The court is of your opinion, and the matter clear.'" The reporter appended the following note to the case of *Hayman* v. *Gerrard*:[2] — "The court said that the replication in this case was well conducted, and as it ought to be, *quod mirum videtur;* for it seems to me that the replication was bad upon that account, but well enough for the other point." The reporter's wonder is now confirmed.[3]

It is one of the principles of eternal justice, that no one is to be punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard.[4] Mr. Justice Foster refers to a very old precedent in support of this doctrine.[5] "I have heard it observed by a very learned man," says he, "that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' says God, 'where art thou?' Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." In a recent case this passage was cited with approbation by Mr. Justice Maule.[6]

The famous judgment of Sancho Panza, acquitting the herdsman charged with rape, was founded on the ascertained fact that the prosecutrix successfully resisted the attempt to take her purse, which the accused made by order of the court. "Sister of mine," said honest Sancho, to the forceful but not forced damsel, "had you shown the same, or but half as much courage and resolution in defending your chastity, as you have shown in defending your money, the strength of Hercules could not have violated you."[7]

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[1] 1 Saund. 6th ed., 33 *b*.
[2] 1 Saund. 6th ed., 103.
[3] See *Thorne* v. *Jenkins*, 12 M & W. 614.
[4] *Ex parte* Ramsbury, 18 Q. B. 190.
[5] Fost. 202; 1 Stra. 557; Andr. 176; 2 Lord Raym. 1334.
[6] *Abley* v. *Dale*, 10 C. B. 71, 72 (1850).
[7] Don Quixote, part 2, book 3, ch. 13.

It was decided as early as the reign of Henry V. that a contract imposing a general restraint on trade is void. Hall J. flew into a passion at the sight of a bond imposing such a condition, and exclaimed: — "A ma intent vous purres aver demurre sur luy que!' obligation est voide, eo que le conditione est encounter common ley, *et per Dieu, si le plaintiff fuit icy, il irra al prison tanq il ust fait fine au Roy.*"

ERROR IN CRIMINAL CASES.[1]

I. Writ of Error Defined.

1. A writ of error is an original writ, issuing from the supreme judicial court to a court of record, proceeding according to the course of the common law, requiring the record and proceedings of the complaint, indictment or information on which judgment has been actually rendered, to be sent to the supreme judicial court, who are authorized to examine the record on which judgment was given; and on such examination and a consideration of the errors assigned, to affirm or reverse the judgment according to law. *Ex parte Cooke*, 15 Pick. 237 (1834); *Thayer* v. *Commonwealth*, 12 Met. 10, 11 (1846).

2. A writ of error is a writ grantable ex debito justitiæ. *Thayer* v. *Commonwealth*, 12 Met. 10 (1846).[2]

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[1] This title is printed from the sheets of the new Digest of the Massachusetts Reports by E. H. Bennett and F. F. Heard, Esqs. The first volume of the Digest will be published by Little, Brown & Co., in June.

[2] In a capital case there is a restraint and qualification of the right of suing out a writ of error. Rev. Sts. c. 112, § 16; Gen. Sts. c. 146, § 13. In *Webster* v. *Commonwealth*, 5 Cush. 393, 394 (1850), the application for the allowance of a writ of error was made at an adjournment of the court held by a single judge, but was postponed to be considered by the whole court.

II. Who are Entitled to a Writ of Error.

3. A writ of error does not lie in a criminal case, in behalf of the commonwealth. *Commonwealth* v. *Cummings*, 3 Cush. 212 (1849).

4. It is the right and privilege of the defendant to bring a writ of error, and reverse an erroneous judgment; but he may well waive the error, and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offence. *Commonwealth* v. *Loud*, 3 Met. 328 (1841); *Commonwealth* v. *Keith*, 8 Met. 532, 533 (1844).

III. Who may join in a Writ of Error.

5. Where two are convicted on an indictment jointly charging them with the offence of larceny, and are severally sentenced thereon to longer terms of imprisonment than are warranted by law, they may join in a writ of error to reverse the judgment. *Sumner* v. *Commonwealth*, 3 Cush. 521 (1849).

IV. When a Writ of Error Lies.

6. Without a judgment, or an award in the nature of a judgment, no writ of error lies. *Ex parte Cooke*, 15 Pick. 237 (1834).

7. If a warrant of commitment be issued by a court of general jurisdiction, although it be erroneous and not comformable to law, it will stand good, unless examined and reversed by writ of error or otherwise; but if a court of special and limited jurisdiction exceed the authority conferred, and issue a warrant of commitment, the judgment is void, and not merely voidable, and the commitment under it is illegal, and may be inquired into on habeas corpus, and if the commitment is wrong, the party may be discharged. *Jones* v. *Robbins*, 8 Gray, 330 (1857).

8. It is not a ground of error that a defendant, who has pleaded in chief, was indicted and convicted by the name of J. T., otherwise called T. D.; misnomer being matter of abatement only. *Turns* v. *Commonwealth*, 6 Met. 224 (1843); 1 Allen, 4.

9. A writ of error lies to reverse a judgment in a criminal case, although the judgment was open to an appeal. *Ex parte Cooke*, 15 Pick. 234 (1834); *Thayer* v. *Commonwealth*, 12 Met. 9 (1846).

10. A writ of error lies to reverse a sentence of additional punishment erroneously awarded on an information. *Riley's case*, 2 Pick. 165 (1824); *Ex parte Cooke*, 15 Pick. 234 (1834); *Wilde* v. *Commonwealth*, 2 Met. 408 (1841). See *Herrick* v. *Smith*, 1 Gray, 49 (1854).

11. Where a sentence of fine and imprisonment has been imposed and the fine paid, and the judgment is erroneous in

imposing imprisonment, the supreme judicial court in the exercise of its discretionary power may discharge the prisoner on habeas corpus, although for an error in the judgment of the court below, a writ of error is the ordinary remedy. *Feeley's case*, 12 Cush. 598 (1853).

12. Where one of two counts in an indictment is bad, and the defendant is found guilty and sentenced, generally, the presumption of law is, that the court awarded sentence by the law applicable to the offence charged in that count; and a writ of error will not lie to reverse the judgment, if the sentence is warranted by the law applicable to the offence charged in that count. *Brown* v. *Commonwealth*, 8 Mass. 64 (1811); *Jennings* v. *Commonwealth*, 17 Pick. 80 (1835); *Josslyn* v. *Commonwealth*, 6 Met. 236 (1843).

13. When a defendant is found guilty, generally, on an indictment which charges him, in one count, with entering a dwelling-house in the night time of a certain day, with intent to commit a larceny, and, in another count, with a larceny on the same day in the same dwelling-house, and he is sentenced to a greater punishment than is warranted by law, either for such entry or for mere larceny in a dwelling-house; the court cannot, on a writ of error, presume that one and the same offence only is charged in the indictment. *Carlton* v. *Commonwealth*, 5 Met. 532 (1843), explained in *Crowley* v. *Commonwealth*, 11 Met. 578, 579 (1846).

14. When an indictment charges, in one count, a breaking and entering a building, with intent to steal, and in another count, a stealing in the same building, on the same day, and the defendant is found guilty generally, the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed on error, because the record does not show whether one offence only, or two, were proved on the trial; and as this must be known by the judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved. *Crowley* v. *Commonwealth*, 11 Met. 575 (1846); *Kite* v. *Commonwealth*, 11 Met. 581 (1846).

15. Where a defendant is found guilty, generally, on an indictment which charges him with adultery, on three different days, with a woman of one name, and on a different day, with a woman of another name, and he is sentenced to a greater punishment than is warranted by law for a single act of adultery; the court cannot, on a writ of error, presume that a single offence only was charged in the indictment. *Booth* v. *Commonwealth*, 5 Met. 535 (1843).

V. Alleging Diminution of the Record.

16. In *Turns* v. *Commonwealth*, 6 Met. 227, 228 (1843), when the case first came before the court, with a return of the record upon the writ of error, upon motion of the attorney-general,

founded upon a suggestion of diminution of the record, a writ of certiorari was ordered, though opposed by the counsel for the plaintiff in error, directed to the chief justice of the court of common pleas, requiring the entire record to be certified and returned to the supreme judicial court.[1]

VI. Second Writ of Error.

17. An affirmance of a judgment, on a writ of error to which in nullo est erratum is pleaded, is a bar to a second writ of error to reverse the same judgment for any error apparent on the record when it was brought before the court on the first writ. *Booth* v. *Commonwealth*, 7 Met. 285 (1843).

18. But where the error arises from matter subsequent to the former decision, and which did not then exist, a new writ of error may be brought, and such new matter assigned for error. *Booth* v. *Commonwealth*, 7 Met. 286 (1843).

19. In *Hopkins* v. *Commonwealth*, 3 Met. 460 (1842), a judgment had been rendered on an information for additional punishment, which judgment was founded upon three or more former convictions. The errors assigned, in the first writ of error, to the judgment on information were, in several instances, supposed defects in those former judgments. But it was decided that whilst such former judgments were in force, the court could not take notice of such defects. Then writs of error were brought to reverse those former judgments, and one or more of them was reversed. When these supports of the judgment on the information were thus removed, the latter became erroneous, by such matter subsequent. This matter of error was not in issue on the first writ, and could not have been considered and determined in the judgment of affirmance. See also *Wilde* v. *Commonwealth*, 2 Met. 408 (1841).

VII. The Plea in Nullo est Erratum.

20. The plea in nullo est erratum is in the nature of a demurrer, and puts in issue the validity of the judgment in all matters of law. *Booth* v. *Commonwealth*, 7 Met. 287 (1843); *Haggett* v. *Commonwealth*, 3 Met. 458 (1842); 6 Met. 490; 3 Gray, 512.

21. New errors may be assigned viva voce at the hearing, taking care that the adverse party is not surprised; and if the judgment is erroneous, in the particulars thus indicated, though not in the particulars assigned for error, the judgment will be reversed. *Booth* v. *Commonwealth*, 7 Met. 287 (1843).

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[1] See 2 Saund. (6th ed.) 101 *z*, 101 *aa*. *Dunn* v. *Regina*, 12 Q. B. 1031.

VIII. Judgment of Reversal.

22. When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in part only, it must be wholly reversed. *Christian* v. *Commonwealth*, 5 Met. 530 (1843).

23. Where a convict brings two writs of error at the same time, one to reverse an original judgment, and the other to reverse a sentence to additional punishment founded on an information which sets forth such original judgment as one of the grounds of such additional punishment; if the original judgment is reversed, the sentence on the information falls with it, and will also be reversed, if the error assigned be a matter of mere law, apparent on the record, although the original judgment was in full force when the writ of error was brought to reverse the sentence on the information. *Hutchinson* v. *Commonwealth*, 4 Met. 359 (1836).

24. Formerly, if the court below had pronounced an erroneous sentence, the court of error had no authority, at common law, to pronounce the proper judgment, or remit the record to the court below, but were bound to reverse the judgment and discharge the defendant. *Shepherd* v. *Commonwealth*, 2 Met. 419 (1841); *Christian* v. *Commonwealth*, 5 Met. 530 (1843); *Sumner* v. *Commonwealth*, 3 Cush. 522, 523 (1849); *Jacquins* v. *Commonwealth*, 9 Cush. 279 (1852).

25. And this rule applied to a case where a sentence had been awarded, to take effect after the expiration of a former sentence, and the prisoner had brought a writ of error to a hearing before the expiration of the former sentence. *Christian* v. *Commonwealth*, 5 Met. 530 (1843).

26. And it made no difference whether the mistake was in his favor by way of an award of sentence, less than the statute requisition, or against him by way of a greater. *Wilde* v. *Commonwealth*, 2 Met. 408; *Stevens* v. *Commonwealth*, 4 Met. 360 (1842); *Rice* v. *Commonwealth*, 12 Met. 247 (1847).

27. But it is now enacted, that "when a final judgment in a criminal case is reversed by the supreme judicial court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." St. 1851, c. 87; Gen. Sts. c. 146, § 16;[1] 9 Cush. 280.

28. This act is not ex post facto, or retrospective in its legislative action. It relates to future proceedings in writs of error

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[1] The St. 11 & 12 Vict. c. 78, sec. 5, contains similar provisions. See the observations of Lord Campbell C. J. on this statute, in *Holloway* v. *Regina*, 2 Denison, 287; 17 Q. B. 317 (1851).

in criminal cases, and it is not retroactive in an obnoxious sense, because it relates to writs of error on past judgments. It relates solely to remedies, and a writ of error is purely remedial. In legal effect, it directs that writs of error in criminal cases, shall only be brought on certain conditions, one of which is, that, if the error is only in the award of punishment, it shall be set right. *Jacquins* v. *Commonwealth*, 9 Cush. 279 (1852).

29. Where the attorney-general filed an information, ex officio, demanding the whole penalty for the commonwealth, on a statute which directed an offence to be prosecuted by bill, indictment or information, the penalty to accrue, two thirds to the commonwealth and one third to the informer, and the penalty was adjudged, two thirds to the commonwealth and one third to A. B., as informer, it not appearing on the record that he was the informer, the court reversed the judgment, and entered a new judgment for the commonwealth for the whole. *Howard* v. *Commonwealth*, 13 Mass. 221 (1816).

IX. Service of a Writ of Error.

30. Where a writ of error is brought upon a judgment in a criminal case, under St. 1842, c. 54, the prosecuting officer of the commonwealth is not bound to take notice and act thereon, until fourteen days after a scire facias to hear errors has been served upon him. *Christian* v. *Commonwealth*, 5 Met. 334 (1842). Gen. Sts. c. 146, § 12.

X. Costs on a Writ of Error.

31. A plaintiff in error, who is discharged on the writ, is entitled to his costs for travel, as an item of the legal costs, to be "borne by the commonwealth," notwithstanding that, during the pendency of the writ of error, he is imprisoned in a house of correction, under the sentence against him. *Britton* v. *Commonwealth*, 1 Cush. 302 (1848). Gen. Sts. c. 146, § 17.

NOTICES OF NEW PUBLICATIONS.

An Introduction to the Principles and Practice of Pleading in Civil Actions in the Superior Courts of Law at Westminster; embracing an Outline of the whole Proceedings in an Action at Law. By Watkin Williams, Esq., Barrister-at-Law. London: Butterworths, 1857. 8vo. pp. 339.

"Special pleading considered in its principle," observe the English common law commissioners, "is a valuable forensic invention, peculiar to the common law of England, by effect of which the precise point in controversy

between the parties is developed and presented in a shape fit for decision." If that point is found to consist of matter of fact, the parties are thus apprised of the exact nature of the question to be decided by the jury, and are enabled to prepare their evidence with appropriate precision. If, on the other hand, it turns out to be matter of law, they have the means of immediately obtaining the decision of the cause, without the expense and trouble of a trial, by demurrer. "It is not expedient to blend questions of law and fact together," said LORD ABINGER C. B.; "the most useful objects of all systems of pleading is to separate them." *Gutsole* v. *Mathers*, 1 M. & W. 502, 503.

The new rules of pleading, which came into force in Trinity Term, 1853, and which are founded in great measure on the prior rules of Easter Term, 1834, and Michaelmas Term, 1838, are intended, like the rules which they supersede, to effect three material objects: first, to make the plaintiff acquainted with the intended defence, and thus to prevent his being taken by surprise at the trial; secondly, to save the expense of collecting unnecessary evidence; and thirdly, to bring *legal* defences more prominently forward on the face of the record. The effect of the recent alterations in pleading has not been to destroy the system or to change its essential principles. The object proposed by the learned commissioners and effected by the late statutes and rules has been only to prefer substance to form, and to prevent unnecessary technicality from working injustice. Although particular forms of expression are no longer indispensable, it is obviously most important, whatever system of pleading is adopted, that pleadings should as far as possible be uniform, and that precedents or forms which have acquired an ascertained and understood meaning should be used in preference to new modes of expression, the meaning of which must necessarily contain the elements of uncertainty and doubt. The object of having certain recognized forms of pleading, is to prevent the time of the court from being occupied with vain and useless speculations as to the meaning of ambiguous terms. POLLOCK C. B. in *Williams* v. *Jarman*, 13 M. & W. 133.

The learned editors of Smith's Leading Cases, Mr. Justice Willes and Mr. Justice Keating, with reference to the effect produced on the science of pleading by the relaxation of the former rules of criticism, and by the powers of amendment given by the Common Law Procedure Act, 1852, remark as follows: "It must however be remembered that the accurate statement of such of the facts and circumstances of each case as are necessary to enable the plaintiff on the one hand to establish his entire cause of action, and the defendant on the other to set up his entire defence, is still an essential part of the duty of counsel; and that although a final defeat of justice upon merely formal grounds may be averted by the provisions already referred to, no legislative enactment can in all cases prevent the expense and delay which result from the necessity for amending untrue or imperfect narratives of the facts relied upon by the respective parties. Such inconveniences are to be avoided by taking care in the first instance to make the pleadings true and perspicuous, adopting the known and understood formulæ used for the sake of brevity in cases of frequent occurrence, and where there is no such formula stating the material facts as they can be proved to exist in intelligible language." 1 Smith's Lead. Cases, (4th London ed.) 103. These remarks of the learned judges are equally applicable to the various codes and systems of pleading in force in some of the United States.

The volume before us exhibits rather the proceedings in an action of law than the rules and principles of pleading. The author commences with the origin of the superior courts, and gives an explanation of the progress from

ancient to modern jurisdiction and procedure. He then furnishes an outline of the procedure by motion and rule of court, and by summons and order at judge's chambers. In the next place, the procedure by action is introduced; an account is given of the classification of actions, and of their different forms; after which the author gives a very full outline of the proceedings, commencing with the notice of action, and a summary of the statutes of limitation. Each proceeding is treated of in the order in which it arises. The nature and object of the pleadings, and of their relation to and bearing upon the other proceedings in the action, are fully explained, particularly when the writer treats of the trial, and of the rules of evidence affecting the pleadings. The author then adverts to proceedings in error to the Exchequer Chamber and House of Lords. There are also chapters upon execution, arrest on mesne process, bail, and costs. The work closes with the rules of practice and pleading. The plan is strictly elementary. To the student we cordially recommend this work. He will find, without the citation of many cases, a succinct view of the various practical steps and order of pleadings in an action at law. The author states a principle and the grounds of it with clearness and precision. We may instance his treatment of the two different classes of cases which give rise to the necessity for a new assignment, p. 136 *et seq.* In *Hannen* v. *Edes*, 15 Mass. 347, the point arose as to the necessity of a special replication, or new assignment, to a plea of *moderate castigavit;* and the practice was recognized of avoiding the effect of such plea by evidence of cruelty or vindictiveness in the beating, on the issue of *de injuria.* The judgment of PARKER C. J. in this case deserves a careful perusal.

But whatever changes may be made in the science of pleading, the great title "Pleader" in Comyns's Digest and the Notes of Judges Patteson and Williams on Serjeant Williams's Notes to Saunders's Reports will always remain the standard authorities in this branch of the law; which last, according to LORD CAMPBELL, contain "the whole of the common law of England," and from which "the present state of the common law may now probably be best learned." H.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NEW BRUNSWICK, with Tables of the Names of the Cases. By JOHN C. ALLEN, Esq., Barrister-at-Law. St. John, N. B. Vol. 3. Vol. 4, Part 1.

We welcome a new volume from the learned reporter of the supreme court of New Brunswick. It is interesting to compare their decisions with those of our own courts, and thus ascertain how far, if at all, they are divergent from the doctrines and principles of the common law, which constitute the general basis of judicial determination in most of the provinces of Great Britain as in most of the States of the Union.

In cursorily looking over the last volumes of the Reports of New Brunswick, we have been struck not merely with the general similarity of legislation, but more especially with the uniformity of decisions between the courts of the province and of the adjoining State, and with the identity of the subject matters to which they relate.

The temperance reform, with its attendant Maine law and its accompanying litigation, is hardly less a topic of discussion in the province than in the State where this legislation had its origin. Similar questions are raised as in Maine and Massachusetts, and usually attended with similar results to the litigants.

In *ex parte Clifford*, 3 Allen, 16, the court held that in a conviction

under the Act 15 Vict., which prohibits the sale of intoxicating liquors except beer, ale, porter and cider, it is insufficient to allege the sale was contrary to the act of assembly. The conviction must negative the exceptions of the act. In *ex parte Parks*, 3 Allen, 237, the court decided that in a prosecution for a penalty for selling liquor without license, proof that the sale was made by a person in the defendant's employ in his absence, and without showing any special employment by him, is sufficient *prima facie* evidence against him. In *Queen* v. *Clifford*, 3 Allen, 320, it was determined that a warrant to search for liquors in a dwelling-house in which a family resides, and no part of which is used as a shop or place for the sale of liquors, cannot issue under the act of 18 Vict., c. 36, without the oath of three persons stating the reasons for believing that liquors have been sold or are kept in such dwelling-house for illegal sale. In *Diver* v. *Corcoran*, 3 Allen, 338, the court held that a sale of liquor, illegal when made, is not rendered valid by a subsequent repeal of the act prohibiting such sale. The original contract being illegal, a promise to pay made after the repeal of the act, is void for want of consideration.

The rights of the crown as the great landowner of the provinces, and of the lumbermen cutting the lumber under permits, and the various liens arising in the course of business, constitute another and by no means unimportant source of litigation.

In *Doe* v. *McCalley*, 3 Allen, 509, is to be found a very full and careful examination of the law as to the effect of a voluntary conveyance without fraudulent intent upon the rights of subsequently accruing creditors. It was held by CARTER C. J., and the majority of the court, that a subsequent creditor, who levied on the premises conveyed, was to be regarded as a purchaser for a valuable consideration, and that as to him such deed was to be regarded as fraudulent and void. But PARKER M. R. and RITCHIE J. were of opinion that at the time of the judgment against the grantor, he had only a bare power of sale and no estate in the land, which could be seized under the execution; and, therefore, that nothing passed by the sheriff's deed. The question is discussed with learning and ability, and the case will amply repay perusal.

In *McAllister* v. *Day*, 4 Allen, 37, a *quaere* is made whether one who has conveyed land and acknowledged in the deed the receipt of the purchase money can recover a balance unpaid on an admission by the purchaser that he owes. It was held in *Steele* v. *Adams*, 1 Green, 1, that the plaintiff in such case was estopped to recover; but this decision has been so effectually shaken by subsequent decisions, that it may be deemed as substantially overruled. Indeed the entire weight of judicial authority in the courts of the several States is in favor of the maintenance of the action.

Litigation would seem less rife in the provinces than with us. In none of the States is there less than a volume issued annually, and in many, there are three or four. In New Brunswick the average time is much greater. The first three volumes of Mr. Allen contain somewhat more than the decisions of two years to a volume.

The differences between the reports of Allen of New Brunswick, and Allen of Massachusetts, are not so much in matters of law as in matters of form. The reports of the one take date from the year of the reign of Victoria, those of the other, from the year of our Lord. The former reports the proceedings of the Hilary, Easter, Trinity, and Michaelmas Terms; the latter, those of the January, September, or October Terms. In the province, our gracious lady the Queen assumes the ungracious task of prosecuting the offender; in the State, the impersonal majesty of the commonwealth performs this duty. But the decisions of the Queen's Bench,

or of the highest courts of the several States, are alike cited as authorities in each tribunal; and the courts on each side of the line dividing democracy from royalty, bow with equal deference to Blackstone and Kent as the great masters of the common law; and to Mitford and Story as authoritative expositors of the liberal doctrines of equity jurisprudence.

These volumes contain the usual variety of topics to be found in a volume of reports. They are printed with care. The reporter has with great brevity and accuracy presented the points decided. We perceive that Mr. Allen has recently been appointed solicitor-general of the province. While the court will thus lose an accomplished reporter of its decisions, the crown will thereby, we doubt not, gain the services of an efficient officer.

CROWN CASES RESERVED FOR CONSIDERATION, and Decided by the Judges of England. To Trinity Term, 1861. By the Hon. E. CHANDOS LEIGH, and LEWIS W. CAVE, Esq. London: V. & R. Stevens & Sons; Sweet; and Maxwell. 1861. Vol. 1. Part I. 8vo. pp. 76.

This volume is a continuation of the reports of the late Mr. Bell, a notice of which appeared in our issue for May. This part includes all the cases that have been decided from the beginning of Hilary Term to the end of Trinity Term, 1861. There are eleven of them, all of which are of great practical value in the administration of the criminal law in this country.

Regina v. *Sleep*, p. 44, is a case of the first importance. The prisoner was indicted, under the 9 & 10 Wm. 3, c. 41, § 2, for having been found in possession of naval stores marked with the broad arrow. The jury returned a verdict that the prisoner was found in possession of copper marked with the broad arrow; that they had not sufficient evidence before them to show that the prisoner knew that the copper was so marked; but that he had reasonable means of knowing that it was so marked. *Held*, That upon these findings the prisoner could not be convicted. COCKBURN C. J.: "It is a principle of our law that to constitute an offence there must be a guilty mind; and that principle must be imported into the statute, although the act itself does not in terms make a guilty mind necessary to the commission of the offence. Cases of innocent possession might be put in which it would be clear that the possessor had not that guilty mind. The authorities which have been cited may be reconciled in this way, viz., that it is a fair presumption, where a man is found in possession of marked articles, that he knew them to be marked; but that presumption may be rebutted by the circumstances of the case. Here it is manifest, if the prisoner's statement is to be believed, that he was ignorant of the fact that the copper was marked; and the ordinary presumption is rebutted."

In *Regina* v. *Weeks*, p. 18, the broad principle was laid down, that upon a trial for felony, other substantive felonies which have a tendency to establish the *scienter* may be given in evidence for that purpose. In this case in "The Weekly Reporter," Vol. IX., p. 554, POLLOCK C. B. is reported to have said that "In order to prove the *scienter*, other substantive collateral felonies may be proved without limit."

A statute enacted that "If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny." It was held, "That the word bailment must be understood in its legal acceptation, viz., a deposit of something to be returned in specie, and does not apply to the receipt of money with an obligation to return the amount,

where there is no obligation to return the identical coin." *Regina* v. *Hassall*, p. 58.

The doctrines as to larceny of lost property in LORD WENSLEYDALE'S very elaborate judgment in *Regina* v. *Thurborn*, 1 Denison, 387, have been affirmed in *Regina* v. *Moore*, p. 1. With regard to the judgment in *Regina* v. *Thurborn*, WILLIAMS J. remarked: "I concurred in that judgment, but not in some of the reasoning on which it was founded, which, I confess, surprised me." H.

THE RULES OF EVIDENCE STATED AND DISCUSSED. By JOHN APPLETON, Justice of the Supreme Judicial Court of Maine. 1 vol. pp. 284. Philadelphia: T. & J. W. Johnson & Co. 1860.

In this volume Judge Appleton has collected various articles which he has from time to time written and published upon the law of evidence. A disciple and admirer of Bentham, he has applied the reasoning and principles of his master and teacher to the law as found in the treatises of jurisconsults, and the decisions of courts. The conclusions to which he arrives are thus briefly stated in his preface: —

"All persons, without exception, who, having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses.

"Objections may be made to the credit, but never to the competency, of witnesses.

"While the best evidence should always be required, the best existing and attainable evidence should not be excluded, because it is not 'the best evidence of which the case is in its nature susceptible.'"

While there are now, probably, few persons who would assent to all of his conclusions — some of which are, in a legal sense, extremely radical, there is no lawyer who will not read with pleasure the earnest and lively discussion, in this volume, of the Rules of Evidence.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
			Returned by
Albee, Lucy J.	Webster,	Nov. 19, '61,	Henry Chapin.
Alden, Samuel F.	Dedham,	Oct. 16, '61,	George White.
Alderman, Jesse F. (1)	Framingham,	March 10, '62,	William A. Richardson.
Atwood, Daniel C.	Natick,	" 7, '62,	William A. Richardson.
Badger, William	Reading,	Nov. 12, '61,	William A. Richardson.
Baker, Amaziah	Provincetown,	Oct. 31, '61,	J. M. Day.
Balloq, Pain G.	Marlboro',	March 18, '62.	William A. Richardson.
Baptist Church,	Lee,	Oct. 5, '61,	J. T. Robinson.
Barnard, Charles A.	Charlestown,	March 6, '62.	William A. Richardson.
Barrett, Augustus L.	Somerville,	" 6, '62,	William A. Richardson.
Barry, Charles A.	Boston,	Nov. 23, '61.	Isaac Ames.
Bartlett, William B.	Cambridge,	March 20, '62.	William A. Richardson.
Bassett, William H. (2)	Boston,	March 20, '62.	Isaac Ames.
Bates, Daniel C.	Roxbury,	Nov. 6, '61.	George White.
Beckford, John D. (3)	W. Roxbury,	" 26, '61.	George White.
Beckwith, Harvey L.	Boston,	March 28, '62.	Isaac Ames.
Benedict, James T.	Boston,	Nov. 13, '61.	Isaac Ames.
Bigley, Daniel	Boston,	Nov. 13, '61.	Isaac Ames.
Boynton, James W.	Lowell,	" 25, '61.	William A. Richardson.
Bradley, John W. (4)	Haverhill,	" 1, '61,	George F. Choate.
Bradley, John W. (4)	Haverhill,	" 1, '64	George F. Choate.
Brown, George W.	Natick,	" 13, '61.	William A. Richardson.
Buckman, John	Charlestown,	" 18, '61,	William A. Richardson.
Burke, Jeremiah (5)	Chelsea,	" 3, '61,	Isaac Ames.

INSOLVENTS IN MASSACHUSETTS — (*continued.*)

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
			Returned by
Carney, Charles F.	Medford,	Nov. 22, '61,	William A. Richardson.
Casey, William A.	Malden,	" 13, '61,	William A. Richardson.
Champney, George	Natick,	" 1, '61,	William A. Richardson.
Chandler, Ensign	S. Danvers,	March 5, '62,	George F. Choate.
Chase, Asa C.	Boston,	Nov. 18, '61,	Isaac Ames.
Chase, William E.	Uxbridge,	" 6, '61,	Henry Chapin.
Coan, William L. (6)	Malden,	" 7, '61,	William A. Richardson.
Cobb, Sewall C. (7)	Boston,	March 28, '62,	Isaac Ames.
Coburn, Rufus (8)	New Salem, N. H.	Nov. 11, '61,	George F. Choate.
Crowell, Charles	Manchester,	Oct. 20, '61,	George F. Choate.
Cutter, Albert M.	Holliston,	Nov. 12, '61,	William A. Richardson.
Cutter, Charles G. (9)	Boston,	" 15, '61,	Isaac Ames.
Damon, Joseph J.	Abington,	" 2, '61,	William H. Wood.
Daniels, David (10)	S. Danvers,	March 22, '62,	George F. Choate.
Daniels, Eben S. (10)	S. Danvers,	" 22, '62,	George F. Choate.
Davis, Adolphus	W. Cambridge,	" 15, '62,	William A. Richardson.
Davy, Asaph M.	Boston,	Nov. 1, '61,	Isaac Ames.
Dawson, George (11)	Ipswich,	" 12, '61,	George F. Choate.
Deacon, William	Boston,	" 9, '61,	Isaac Ames.
Ellery, William P. (12)	Gloucester,	March 17, '62,	George F. Choate.
Ellis, David	Lynn,	Oct. 10, 61,	George F. Choate.
Ellis, James H.	Bridgewater,	Nov. 18, '61,	William H. Wood.
Ellis, William W.	Bridgewater,		William H. Wood.
Farwell, Royal E.	Natick,	Nov. 29, '61,	William A. Richardson.
Flanders, John L.	Lynn,	March 17, '62,	George F. Choate.
French, Leander	Natick,	" 28, '62,	William A. Richardson.
Gay, Ebenezer	Hingham,	Nov. 4, '61,	William H. Wood.
George, John C. (3)	Boston,	" 26, '61,	George White.
Getchell, Joshua	Ipswich,	Sept. 24, '61,	George F. Choate.
Goldsmith, Benjamin	Stoneham,	March 5, '62,	William A. Richardson.
Goldthwait, Joseph (13)	Stoughton,	Nov. 18, '61,	George White.
Gore, Watson, Jr. (1)	Boston,	March 10, '62,	William A. Richardson.
Gould, George P.	Lowell,	" 10, '62,	William A. Richardson.
Gould, Nathaniel S. (14)	Wenham,	Oct. 8, '61,	George F. Choate.
Hamblin, Benjamin	Needham,	" 16, '61,	George White.
Harris, William, Jr.	Dorchester,	Nov. 2, '61,	George White.
Hart, James S.	Newburyport,	Oct. 16, '61,	George F. Choate.
Hastings, Henry J.	Lunenburg,	March 18, '62,	Henry Chapin.
Hawks, Gilbert	Lynn,	Oct. 14, '61,	George F. Choate.
Hayward, Henry	Stoughton,	" 8, '61,	George White.
Heath, Orson N.	Worcester,	March 15, '62,	Henry Chapin.
Henderson, Joseph (6)	Boston,	Nov. 7, '61,	William A. Richardson.
Holcomb, John S.	Conway,	March 17, '62,	Charles Mattoon.
Howe, Charles W.	Andover,	Nov. 12, '61,	George F. Choate.
Ingall, J. Wilson	Randolph,	March 31, '62,	George White.
Johnson, G. T. (2)	Boston,	" 20, '62,	Isaac Ames.
Jones, J. W. (13)	Stoughton,	Nov. 18, '61,	George White.
Joslyn, Henry E.	Boston,	March 22, '62,	Isaac Ames.
Kelly, Amos S.	Haverhill,	Oct. 18, '61,	George F. Choate.
Kellogg, Charles D. (6)	Boston,	Nov. 7, '61,	William A. Richardson.
Kimball, Ambrose L. (8)	Haverhill,	" 11, '61,	George F. Choate.
Kimball, John N.	Malden,	" 29, '61,	William A. Richardson.
Kingman, Bradford (15)	Brookline,	March 12, '62,	George White.
Lancaster, George T. (15)	Haverhill,	Oct. 31, '61,	George F. Choate.
Lancaster, George T.	Haverhill,	Nov. 4, '61,	George F. Choate.
Lane, Rufus, Jr.	Hingham,	" 28, '61,	William H. Wood.
Lane, Samuel G.	Charlestown,	" 30, '61,	William A. Richardson.
Larry, John W.	Boston,	March 6, '62,	Isaac Ames.
Lee, George W.	Haverhill,	Nov. 5, '61,	George F. Choate.
Macurdy, Hayes W.	Watertown,	March 7, '62,	William A. Richardson.
Mansfield, John	Boston,	" 31, '62,	Isaac Ames.
Martin, Aaron A.	Douglas,	Nov. 28, '61,	Henry Chapin.
Mayall, Miles	Hamilton,	March 19, '62,	George F. Choate.
McEneany, Bernard (5)	Chelsea,	Nov. 12, '61,	Isaac Ames.
Means, John, Jr.	Dorchester,	Oct. 9, '61,	George White.
Mee, John	Millbury,	March 24, '62,	Henry Chapin.
Meserve, Samuel W. (16)	Canton,	Nov. 1, '61,	George White.
Mitchell, Augustus	N. Bridgewater,	" 4, '61,	William H. Wood.

INSOLVENTS IN MASSACHUSETTS — (*continued.*)

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
			Returned by
Morrise, John (12)	Gloucester,	March 17, '62.	George F. Choate.
Newton, David A.	Marlboro',	" 15, '62.	William A. Richardson.
Noyes, Isaac S.	Salem,	" 4, '62.	George F. Choate.
Oliver, David B. (17)	S. Reading,	" 19, '62.	William A. Richardson.
Oliver, Henry (17)	S. Reading,	" 19, '62.	William A. Richardson.
Oliver, John G. (17)	S. Reading,	" 19, '62.	William A. Richardson.
Ordway, George W. (4)	Bradford,	Nov. 1, '61.	George F. Choate.
Ordway, George W. (4)	Bradford,	" 4, '61.	George F. Choate.
Parker, William T.	Boston,	" 12, '61.	Isaac Ames.
Parks, Levi N.	Winchendon,	March 10, '62.	Henry Chapin.
Pendergast, Francis	Boston,	" 12, '62.	Isaac Ames.
Penniman, Tyler S.	Paxton,	Nov. 1, '61.	Henry Chapin.
Persons, Alonzo W. (9)	Boston,	" 15, '61.	Isaac Ames.
Poor, Samuel, Jr. (18)	Boston,	March 21, '62.	Isaac Ames.
Prince, James H.	Winchester,	" 14, '62.	William A. Richardson.
Putnam, Benjamin C. (14)	Wenham,	Oct. 8, '61.	George F. Choate.
Putnam, Nathan	Salem,	March 10, '62.	George F. Choate.
Reed, Samuel W. (7)	Boston,	" 28, '62.	Isaac Ames.
Rice, George T., Jr.	Worcester,	Nov. 28, '61.	Henry Chapin.
Richardson, Henry H.	Roxbury,	" 27, '61.	George White.
Roberts, David S.	Boston,	" 28, '61.	Isaac Ames.
Rundlett, James H. (11)	Bradford,	" 12, '61.	George F. Choate.
Sanborn, John D.	Rockport,	Oct. 2, '61.	George F. Choate.
Sanborn, John D.	Rockport,	March 8, '62.	George F. Choate.
Sargent, G. F. (19)	Cambridge,	Nov. 16, '61.	George White.
Seavey, John E. (16)	Canton,	" 1, '61.	George White.
Shattuck, Luther F., Jr.	Haverhill,	" 12, '61.	George F. Choate.
Sherman, Daniel P.	Weymouth,	" 4, '61.	William H. Wood.
Skinner, Benjamin C.	Athol,	" 23, '61.	Henry Chapin.
Slocomb, Rufus T. (20)	Haverhill,	" 4, '61.	George F. Choate.
Smith, Nathaniel	Natick,	March 6, '62.	William A. Richardson.
Spencer, Charles B.	Roxbury,	Nov. 23, '61.	George White.
Stevens, John V.	S. Danvers,	" 29, '61.	George F. Choate.
Stevens, Samson	Boston,	March 6, '62.	Isaac Ames.
Suffolk Cordage Co.	Roxbury,	Oct. 8, '61.	George White.
Sumner, Henry H.	Foxboro',	March 5, '62.	George White.
Tate, Samuel W. (20)	Haverhill,	Nov. 4, '61.	George F. Choate.
Thomas, George	Quincy,	" 7, '61.	George White.
Tolman, William G.	Fitchburg,	March 6, '62.	Henry Chapin.
Vivian, Willard S.	Gloucester,	Oct. 1, '61.	George F. Choate.
Vose, James W.	Boston,	Nov. 9, '61.	Isaac Ames.
Wade, Jacob N.	Dorchester,	March 7, '62.	George White.
Walsh, James A. (18)	Boston,	" 21, '62.	Isaac Ames.
Warren, John A.	Boston,	" 6, '62.	Isaac Ames.
Wheeler, Theodore	Boston,	" 24, '62.	Isaac Ames.
White, Nathan H.	Quincy,	Oct. 15, '61.	George White.
Whiton, Royal, Jr. (19)	Dorchester,	Nov. 16, '61.	George White.
Whittier, Alvah	Haverhill,	March 25, '62.	George F. Choate.
Willis, William A.	Douglas,	Nov. 28, '61.	Henry Chapin.
Wilson, Benjamin F.	Boston,	" 26, '61.	Isaac Ames.
Winchester, Granville H.	Southboro',	March 29, '62.	Henry Chapin.
Woodman, Bradstreet P. (15)	Haverhill,	Oct. 31, '61.	George F. Choate.
Woodman, Bradstreet P. (15)	Haverhill,	Nov. 4, '61.	George F. Choate.
Young, Darius	Newton,	March 19, '62.	William A. Richardson.

PARTNERSHIPS, &c.

(1) Alderman & Gore; (2) Johnson & Bassett; (3) Beckford & George; (4) Bradley & Ordway; (5) J. Burke & Co.; (6) C. D. Kellogg & Co.; (7) Reed & Cobb; (8) R. Coburn & Co.; (9) Persons & Cutter; (10) D. Daniels & Co.; (11) Rundlett & Dawson; (12) Ellery & Morrise; (13) J. W. Jones & Co.; (14) B. C. Putnam & Co.; (15) Woodman & Lancaster; (16) Seavey & Meserve; (17) J. G. Oliver & Brothers; (18) Poor & Walsh; (19) Whiton, Bartlett & Co.; (20) Slocomb & Tate.